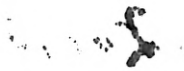
San Francisco
Law Library

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.



No. 10939 2463

United States
Circuit Court of Appeals
For the Ninth Circuit.

SALVATORE MAUGERI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 55 Eleventh Street, San Francisco

No. 10939

United States
Circuit Court of Appeals
For the Ninth Circuit.

SALVATORE MAUGERI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 55 Eleventh Street, San Francisco

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index **Page**

Index Page

Index **Page**

NAMES AND ADDRESSES OF ATTORNEYS

MR. SOL A. ABRAMS,

406 Montgomery Street,
San Francisco, California.

Attorney for Defendant and Appellant.

MR. FRANK J. HENNESSY,

United States Attorney,
Northern District of California.

MR. JAMES T. DAVIS,

Assistant United States Attorney,
Northern District of California.
Post Office Building,
San Francisco, California.

Attorneys for Plaintiff and Appellee.

In the Southern Division of the United States District Court for the Northern District of California.

No. 28852-G

FIRST COUNT. 21 United States Code Section 174;

In the July 1944 term of said Division of said District Court, the Grand Jurors thereof on their oaths present:

That Salvatore Maugeri, Joseph Tocco, and Joseph Barri (whose full and true names are other than hereinabove stated to said Grand Jurors unknown, hereinafter called said defendants), on or about the 12th day of August, 1944, at the City of Santa Cruz, County of Santa Cruz, State of California, within said Division and District, fraudulently and knowingly did conceal and facilitate the concealment of a lot of smoking opium in quantity particularly described as 105 tins containing approximately 700 ounces of smoking opium, and the said smoking opium had been imported into the United States of America contrary to law as said defendants then and there knew.

SECOND COUNT: 21 USCA Section 174;

And the said Grand Jurors on their oaths aforesaid do further present: [1*]

That on or about the 13th day of August, 1944, at the City of Santa Cruz, County of Santa Cruz,

*Page numbering appearing at foot of page of original certified Transcript of Record.

State of California, within said Division and District, said defendants fraudulently and knowingly did facilitate the transportation of a lot of smoking opium, in quantity particularly described as 105 tins containing approximately 700 ounces of smoking opium, and the said smoking opium had been imported into the United States of America contrary to law as said defendants then and there knew.

FRANK J. HENNESSY,
United States Attorney

A true bill,

CHAS. HOEHN,
Foreman

[Endorsed]: Presented in Open Court and Ordered Filed Aug. 23, 1944.

Approved as to Form:
R. B. McM. [2]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 24th day of August, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Louis E. Goodman,
District Judge.

No. 28852-G

UNITED STATES OF AMERICA

vs.

SALVATORE MAUGERI

ARRAIGNMENT

In this case the defendant Salvatore Maugeri was produced in Court by the United States Marshal pursuant to Bench Warrant heretofore issued. No attorney appeared on behalf of the defendant. Joseph Karesh, Esq., Assistant United States Attorney, was present on behalf of the United States.

On motion of Mr. Karesh, the defendant was called for arraignment. The Court advised the defendant of his constitutional right to be represented by counsel, and that if he had no means to procure counsel the Court will appoint an attorney to represent him, without cost to defendant. Defendant stated that he would obtain his own counsel.

Defendant was informed of the return of the Indictment by the United States Grand Jury, and asked if he was the person named therein, and upon his answer that he was, and that his true name was as charged, said defendant was [3] informed of the charge against him and stated that he understood the same. The Clerk read the Indictment to the defendant.

After hearing the defendant and Mr. Karesh, the Court ordered that this case be continued to August 28, 1944, to plead. Further ordered that in default of bail defendant be remanded into the custody of the United States Marshal to await entry of plea and that a mittimus issue. [4]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 28th day of August, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Louis G. Goodman, District Judge.

[Title of Cause.]

No. 28852-G

DEFENDANT'S PLEA OF NOT GUILTY ENTERED

This case came on regularly this day for entry of plea and for hearing of motion on re*dude* bail. The defendant, Salvatore Maugeri, was present in the custody of the United States Marshal and with his attorney, Sol A. Abrams, Esq. James T. Davis, Esq., Assistant United States Attorney, was present on behalf of the United States.

The defendant was called to plead and thereupon said defendant entered a plea of "Not Guilty" to the Indictment filed herein against him, which said plea was ordered entered.

After hearing the Attorneys, it is ordered that this case be continued to September 6, 1944, to be set for trial. Ordered that the motion for reduction of bail be continued to August 29, 1944, for hearing.

[5]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 6th day of September, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause]

No. 28852-G

DEFENDANT'S PLEA OF NOT GUILTY ENTERED

This case came on regularly this day for entry of plea. The defendant, Salvatore Maugeri, was present in proper person and with his attorney, Sol A. Abrams, Esq. James T. Davis, Esq., Assistant United States Attorney, was present on behalf of the United States.

The defendant was called to plead and thereupon said defendant entered a plea of "Not Guilty" to the Indictment filed herein against him, which said plea was ordered entered.

On motion of Mr. Davis and with consent of Mr. Abrams, the Court ordered that this case be continued to September 20, 1944, to be set. [6]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 21st day of November, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

No. 28852

MINUTES OF TRIAL

This case came on regularly this day for trial. Hon. Frank J. Hennessy, United States Attorney, was present on behalf of the United States. The defendant, Salvatore Maugeri, was present in proper person and with his attorneys, Sol A. Abrams, Esq., and M. S. Snyder, Esq. Thereupon the following persons, viz:

Walter E. Ayden	Mrs. Tillie Green
Mrs. Harriette E. Richardson	Leonard B. Daniels
Florence Fairmen	William McNamara
Claire V. Goodwin	Clyde H. Mann
John J. Niebauer	Mrs. Rita O'Connor
John R. B. Tayler	Walter L. Brown

twelve good and lawful jurors, were, after being duly examined under oath, accepted and sworn to

try the issues joined herein. Mr. Hennessy made a statement to the Court and Jury on behalf of the United States. Mr. Hennessy introduced U. S. Exhibits Nos. 1 and 2 for identification; and introduced and filed in evidence U. S. Exhibits Nos. 3, 4, 5 and 6. [7] Benedict Pocoroba was sworn and testified on behalf of the United States.

The hour of adjournment having arrived, the Court, after admonishing the Jury, ordered that the further trial of this case be continued to November 22, 1944, at 10 o'clock a.m. [8]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 22nd day of November, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

No. 28852-G

TRIAL RESUMED

The parties hereto and the jury heretofore impanel being present as heretofore, the trial of this case was this day resumed. Benedict Pocoroba re-

sumed the stand for further testimony. Peter Scambellone, John Saccocci, Buhrl R. Harwood, Henry B. Hays, Jesse M. Braly and Emmett Gleason were sworn and testified on behalf of the United States. Mr. Abrams introduced Defendant's Exhibit A for identification; and introduced and filed in evidence Defendant's Exhibits B and C.

The hour of adjournment having arrived, the Court, after admonishing the jury, ordered that the further trial of this case be continued to November 24, 1944, at 10 o'clock A.M. [9]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 24th day of November, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.[

No. 28852-G

TRIAL RESUMED

The parties hereto and the jury heretofore impaneled herein being present as heretofore, the trial of this case was this day resumed. Thomas E. Mc-

Guire, Vance Newman and George E. Mallory were sworn and testified on behalf of the United States. Mr. Hennessy introduced and filed in evidence U. S. Exhibits Nos. 7, 8 and 9; and filed in evidence U. S. Exhibits Nos. 1 and 2, formerly U. S. Exhibits Nos. 1 and 2 for identification. Benedict Pocoroba was recalled for further cross-examination. Thereupon the United States rested. Mr. Abrams made a motion for directed verdict of acquittal. Ordered said motion denied. Salvatore Maugeri was worn and testified on his own behalf. The evidence was then closed.

The hour of adjournment having arrived, the Court, after admonishing the jury, ordered that the further trial of this case be continued until November 28, 1944, at 10 a.m. [10]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 28th day of November, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Louis E. Goodman,
District Judge.

No. 28852-G

UNITED STATES OF AMERICA,

vs.

SALVATORE MAUGERI, et al.

TRIAL RESUMED—VERDICT OF GUILTY

The parties hereto and the jury heretofore impaneled being present as heretofore, the trial of this case was this day resumed. After argument by the attorneys and the instructions of the Court to the jury, the jury at 3:55 P.M. retired to deliberate upon its verdict. At 4:55 P.M., the jury returned into Court and upon being asked if they had agreed upon a verdict, replied in the affirmative and returned the following verdict which was ordered recorded, viz:

"We, the Jury, find as to the defendant at the bar as follows:

As to Count One—Guilty

As to Count Two—Guilty

WALTER E. AYDEN,
Foreman."

The jury upon being asked if said verdict as recorded is the verdict of the jury, each juror replied that it was.

Ordered that the jury be excused from further consideration hereof and from attendance upon the Court until notified [11] to report.

Mr. Abrams made a motion for a new trial and for arrest of judgment. Ordered that this matter be

continued to November 30, 1944, for hearing said motion for new trial and for pronouncing of judgment. Ordered that the defendant be remanded into the custody of the United States Marshal to await judgment and that a mittimus issue.

Further ordered, pursuant to stipulation of the attorneys, that all exhibits be given by the Clerk of this Court into the custody of the Bureau of Narcotics until further order of this Court. Accordingly, said exhibits were delivered by the Clerk to the Narcotic Agents. [12]

In the Southern Division of the United States District Court for the Northern District of California, Southern Division.

No. 28852-G

THE UNITED STATES OF AMERICA,

vs.

SALVATORE MAUGERI,

VERDICT OF GUILTY

We, the Jury, find as to the defendant at the bar as follows: as to Count One Guilty; as to Count Two Guilty.

WALTER E. AYDEN
Foreman

[Endorsed]: Filed Nov. 28, 1944. [13]

[Title of District Court and Cause.]

MOTION OF SALVATORE MAUGERI IN ARREST OF JUDGMENT

Comes now the defendant in the above entitled action, and against whom a verdict of guilty was rendered on the 28th day of November, 1944, in the above entitled cause, and moves the Court to arrest the judgment against said defendant and hold for naught the verdict of guilty rendered against said defendant upon each and every count, for the following causes:

1. That the verdict is contrary to the evidence adduced at the trial herein.

2. That the verdict is not supported by the evidence in the case.

3. That the evidence adduced at the trial is insufficient to justify said verdict.

4. That said verdict is contrary to law.

5. That the trial court erred in admitting evidence in the course of the trial where no proper foundation had been laid.

6. That the trial court erred in admitting evidence in the course of the trial which was hearsay.

[14]

7. That the trial court erred in admitting in evidence during the course of the trial physical evidence, to wit, suitcases, cartons, wrapping paper, gummed tape, cans containing narcotics and package containing narcotics where no proper foundation had been laid.

8. That the trial court erred in permitting testimony to be given during the course of the trial concerning the physical evidence referred to in the preceding paragraph.

9. That the trial court erred in denying defendant's motion made at the close of plaintiff's case, for a directed verdict of acquittal on both counts of the indictment, for the reason that the legal evidence as a matter of law was insufficient to support a verdict of guilty.

Wherefore, because of which said errors in the record hereof, no lawful judgment may be rendered by the Court, said defendant prays that this motion be sustained and that judgment of conviction against him be arrested and held for naught and that he have all such other orders as may seem meet and just in the premises.

This written motion is by leave of Court and supplements the oral motion heretofore made by said defendant, and is made upon the minutes of the Court, upon all records and proceedings in said action, and upon all the testimony and evidence introduced at the trial herein.

Dated November 29, 1944.

SOL A. ABRAMS
Attorney for defendant.

[Endorsed]: Filed Nov. 30, 1944. [15]

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Now comes the defendant Salvatore Maugeri in the above entitled action and moves this Honorable Court for an order vacating the verdict of the jury convicting said defendant, and granting said defendant a new trial on both counts of the indictment for the following, and each of the following causes materially affecting his Constitutional rights, to wit:

1. That the verdict is contrary to the evidence adduced at the trial herein.

2. That the verdist is not supported by the evidence in the case.

3. That the evidence adduced at the trial is insufficient to justify said verdict.

4. That said verdict is contrary to law.

5. That the trial court erred in admitting evidence in the course of the trial where no proper foundation had been laid.

6. That the trial court erred in admitting evidence in the course of the trial which was hearsay.

7. That the trial court erred in admitting in evidence [16] during the course of the trial physical evidence, to wit, suitcases, cartons, wrapping paper, gummed tape, cans containing narcotics and package containing narcotics where no proper foundation had been laid.

8. That the trial court erred in permitting testimony to be given during the course of the trial concerning the physical evidence referred to in the preceding paragraph.

9. That the trial court erred in denying defendant's motion made at the close of plaintiff's case, for a directed verdict of acquittal on both counts of the indictment, for the reason that the legal evidence as a matter of law was insufficient to support a verdict of guilty.

To all of which rulings the defendant duly and regularly excepted.

This written motion, by leave of Court, supplements the oral motion heretofore made by said defendant, and is made upon the minutes of the Court, upon all records and proceedings in said action, and upon all the testimony and evidence introduced at the trial herein.

Dated November 30, 1944.

SOL A. ABRAMS,
Attorney for defendant.

[Endorsed]: Filed Nov. 30, 1944. [17]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 30th day of November, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

No. 28852-G

MOTIONS FOR ARREST OF JUDGMENT AND FOR NEW TRIAL DENIED; JUDGMENT AS TO SALVATORE MAUGERI

This case came on regularly this day for the pronouncing of judgment as to the defendant, Salvatore Maugeri. The defendant was present in the custody of the United States Marshal and with his attorney, Sol A. Abrams, Esq. Hon. Frank J. Hennessy, United States Attorney, was present on behalf of the United States.

The defendant was called for judgment. After hearing the attorneys, it is ordered that the motions for arrest of judgment and for new trial be and the same are hereby denied. After hearing the defendant and the attorneys, and said defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court [18] Ordered and Adjudged that the defendant Salvatore Maugeri, having been convicted on the verdict of the jury of Guilty of the offenses charged in the Indictment filed herein against him, be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Ten (10) Years and pay a fine to the United States of America in the sum of Five Thousand ($5,000.00) Dollars on the First Count of the Indictment; and be imprisoned

for the period of Ten (10) Years and pay a fine to the United States of America in the sum of Five Thousand ($5,000.00) Dollars on the Second Count of the Indictment (making a total fine in the sum of Ten Thousand ($10,000.00) Dollars.

It Is Further Ordered that the sentence of imprisonment imposed by this Court on defendant on the Second Count of the Indictment commence and run at the expiration of the sentence of imprisonment imposed by this Court on defendant on the First Count of the Indictment.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

The Court recommends commitment to a U. S. Penitentiary. [19]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of Appellant: Salvatore Maugeri, County Jail, City and County of San Francisco, State of California.

Name and address of Appellant's attorney: Sol A. Abrams, 406 Montgomery Street, San Francisco, California.

Offense: First Count, a violation of Jones-Miller Act, 21 USC 174.

That the defendant did, on or about the 12th day of August, 1944, at the City of Santa Cruz, County of Santa Cruz, State of California, within said Division and District, fraudulently and knowingly conceal and facilitate the concealment of a lot of smoking opium in quantity particularly described as 105 tins containing approximately 700 ounces of smoking opium, and the said smoking opium had been imported into the United States of America contrary to law as said defendant then and there knew.

Second Count: A violation of Jones-Miller Act, 21 USC 174.

That the defendant did, on or about the 13th day of August, 1944, at the City of Santa Cruz, County of Santa Cruz, State of [20] California, fraudulently and knowingly facilitate the transportation of a lot of smoking opium, in quantity described as 105 tins containing approximately 700 ounces of smoking opium, and the said smoking opium had been imported into the United States of America contrary to law as said defendant then and there knew.

Dated of Judgment: November 30, 1944.

Description of Judgment and Sentence: Defendant "guilty" upon counts one and two of said indictment as above set forth.

Sentence: Defendant ten years imprisonment and a fine of $5000 on first count: ten years imprisonment and a fine of $5000 on second count, sentences to run consecutively.

Name of Prison where now confined: County Jail of the City and County of San Francisco.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeal of the Ninth Circuit, from the judgment above mentioned, on the grounds set forth below.

Dated: November 30, 1944.

SALVATORE MAUGERI
Appellant
SOL A. ABRAMS
Attorney for Appellant.

GROUNDS OF APPEAL

I.

That the learned trial judge committed errors in law arising during the course of the trial, and erred in the decision of questions of law arising during the course of the trial.

II.

That the evidence produced and received upon the trial of said cause was insufficient as a matter of law to justify the verdict of the jury. [21]

III.

That the learned trial judge committed error in allowing hearsay evidence upon the trial of said cause.

IV.

That the learned trial judge erred in denying appellant's motion, made at the close of appellee's case, for a directed verdict of acquittal on both counts of the indictment, for the reason that the legal evidence as a matter of law was insufficient to support a verdict of guilty.

V.

That the learned trial judge erred in admitting in evidence during the course of the trial physical evidence, to wit, suitcases, cartons, wrapping paper, gummed tape, tins containing narcotics and package containing narcotics where no proper foundation had been laid.

VI.

That the learned trial judge erred in permitting testimony to be given during the course of the trial concerning the physical evidence referred to in the preceding paragraph.

VII.

That the learned trial judge erred in denying appellant's motion for a new trial made after the verdict and before the pronouncement of sentence, upon the grounds orally stated at the time, and supplemented by written motion filed immediately thereafter.

VIII.

That the learned trial judge erred in denying appellant's motion for arrest of judgment made after the verdict and before the pronouncement of sentence, upon the grounds orally stated at the time and supplemented by written motion filed immediately thereafter.

[Endorsed]: Filed Dec. 1, 1944. [22]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now Salvatore Maugeri, defendant in the above entitled case, and in connection with his appeal in this case, assigns the following errors on which he relies in the prosecution of said appeal to the United States Circuit Court of Appeals:

1. That the verdict is contrary to the evidence adduced at the trial herein.

2. That the verdict is not supported by the evidence in the case.

3. That the evidence adduced at the trial is insufficient to justify said verdict.

4. That said verdict is contrary to law.

5. That the trial court erred in admitting evidence in the course of the trial where no proper foundation had been laid.

6. That the trial court erred in admitting testimony in the course of the trial which was heresay.

7. That the trial court erred in admitting in evidence during the course of the trial physical evidence, to wit, suitcases, cartons, wrapping paper, gummed tape, tins containing [23] narcotics and package containing narcotics where no proper foundation had been laid.

8. That the trial court erred in permitting testimony to be given during the course of the trial concerning the physical evidence referred to in the preceding paragraph.

9. That the trial court erred in denying defend-

ant's motion made at the close of plaintiff's case, for a directed verdict of acquittal on both counts of the indictment, for the reason that the legal evidence as a matter of law was insufficient to support a verdict of guilty.

Wherefore defendant prays that the judgment and conviction herein be reversed, that his arrest and the indictment be quashed and that he be dismissed.

Dated: December 1, 1944.

SOL A. ABRAMS
Attorney for Defendant

Receipt of a copy of the within Assignment of Errors admitted this 5th day of December, 1944.

FRANK J. HENNESSY,
United States Attorney
By JAMES D. DAVIS
Assistant United States Attorney
Attorney for Plaintiff

[Endorsed]: Filed Dec. 5, 1944. [24]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of Said Court:

Sir:

Please make transcript of appeal to consist of following:

1. Indictment.
2. Plea of defendant.
3. Minutes of trial.
4. Verdict.
5. Motion for new trial.
6. Motion in arrest of judgment.
7. Order denying motion for new trial and motion in arrest of judgment.
8. Judgment.
9. Notice of Appeal.
10. Assignment of errors.
11. Bill of exceptions.
12. Order settling bill of exceptions.
13. This praecipe.
14. Additional and Amended Assignment of Errors.

SOL A. ABRAMS
Attorney for defendant

[Endorsed]: Filed Dec. 8, 1944. [25]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be it remembered, that heretofore, to-wit, on the 21st day of November, A. D. 1944, before the Honorable Louis E. Goodman and a jury, the above-entitled cause came on for trial, and that upon said trial of said cause, Mr. Frank J. Hennessy, United States Attorney, appeared as counsel for the plaintiff; and Mr. Sol A. Abrams appeared as counsel

for the defendant, Salvatore Maugeri, and the following proceedings were had.

TESTIMONY OF BENEDICT POCOROBA

For the United States.

Benedict Pocoroba, produced as a witness on behalf of the United States, having been first duly sworn, testified substantially as follows:

My name is Benedict Pocoroba. I understand and speak English. I was born in Italy, and I came to the United States in 1914, and was naturalized as a citizen of the United States in the year 1919. I am now 55 years of age. I understand and speak the Italian language also, and am of Italian ancestry. [26] My occupation is Federal narcotics agent. I have been a Federal narcotics agent for sixteen years last past. My home is in Chicago, Illinois. I arrived in Santa Cruz, California, on May 1, 1944, pursuant to orders from my superiors in the Bureau of Narcotics. Upon arriving in Santa Cruz on May 1, 1944, I was met at the bus station by Agents Newman and Hayes, of the Federal Narcotics Bureau. I registered at the Graystone Hotel under the name of Benedict Vicari.

"Q. Do you know a man named Salvatore Maugeri? A. I do.

Q. Do you see him in the courtroom?

A. Yes; right there.

Mr. Hennessy: May the record show he points to the defendant?

(Testimony of Benedict Pocoroba.)

Mr. Abrams: Yes; so stipulated.

Mr. Hennessy: Q. Do you know him by any other name? A. Sam Maugeri.

Q. Is that the name under which he is familiarly known among his friends in Santa Cruz?

A. Yes.

Q. Sam Maugeri? A. Yes."

The witness testified further: I first met Sam, or Salvatore, Maugeri on May 7, 1944, at his concession on the Boardwalk in Santa Cruz. There was no particular name for the amusement concession; it only said, "10c You Play Until You Win." At times he personally attended to this concession and at other times his daughters helped him out. The concession was generally open for business from 9:00 o'clock in the morning until 1:00 o'clock the following morning, depending on the volume of business that was being done. After I first met Salvatore Maugeri I saw him quite frequently and conversed with him. I told him my name was Benny Vicari, and that was the name under which he knew me. I first visited the home of Mr. Maugeri at 32 Main Street, Santa [27] Cruz, and met his wife and family on May 15, 1943. At that time he had invited me to his home. He closed temporarily the concession at approximately 5:00 o'clock on the afternoon of that day, and I accompanied him to his home and had dinner there. At about 9:00 o'clock on that evening the defendant drove me to my hotel. I visited Salvatore Maugeri's home on many occasions subsequent to the first visit. I

(Testimony of Benedict Pocoroba.)

would say I visited at his home on an average of at least twice a week. On May 22, 1944, I moved from the Graystone Hotel to Miller's Apartments, located on Beach Street, Santa Cruz. Miller's Apartments are located within a block of the beach at Santa Cruz. The cabin which I rented at Miller's Apartments was a couple of blocks from Maugeri's concession on the Boardwalk.

On several occasions I accompanied Mr. Maugeri to San Francisco. On the first occasion, which was on June 5th, Mrs. Maugeri, Mr. Maugeri and myself made the trip in Maugeri's Oldsmobile sedan. We made the trip to San Francisco and returned to Santa Cruz on the same day.

On June 6th I had a conversation with Maugeri about narcotics. On that evening I had been to Maugeri's house for dinner. We left the house and were returning to his concession on the Boardwalk in a Chevvy coupe which belonged to him and that he was driving at the time. No one was present but Maugeri and Myself. I told Maugeri at that time that I was not personally interested in narcotics, because I had made my money years ago and I was not engaged actively in any racket like that, but I told him I had some friends in Chicago who might be interested in it. Maugeri asked me what heroin sold for in the East, and he asked me if one can of opium will make one ounce of heroin. The next day I saw Maugeri at his concession, and he said, "Why don't you write to your friends which

(Testimony of Benedict Pocoroba.)

[28] you have in Chicago and see if we can make a connection?" I promised that I would write. Later I told him I had written a letter to Chicago. On June 15th Maugeri came to my cabin, to my cottage, and told me that he had some olive oil at his concession for me, and then I showed him a letter which I had that day received from Chicago in connection with narcotics. I showed the letter to Maugeri. According to the letter, the men in Chicago were willing to pay $150 or $160 a can for opium. Maugeri at that time said the best price he would sell for would be $225 to $250 a can in 50-can lots. In a previous conversation, when he told me that he would sooner deal in narcotics, when I asked him what kind he would furnish he said, "Mud," which is the underworld term for opium.

On July 6, 1944, I met a man by the name of Joe Tocco at Maugeri's house. I went to Maugeri's house in the morning, and Joe Tocco came from another room; I don't know whether he came from the upstairs part of the house. He was dressed in a sports shirt and all indications were that he had spent the night there. He was introduced to me as "Joe, from San Diego." I was introduced to him as "Mr. Vicari." On that evening I had dinner at Maugeri's house. Tocco was present at that time. I met Tocco at Maugeri's house several times subsequently at dinner. Tocco was stopping at Maugeri's house. Tocco visited my cabin and used it for the purpose of changing his clothes on occasions

(Testimony of Benedict Pocoroba.)

when he went to the beach to swim. This was with my permission and consent.

On July 8th I met Maugeri's son, who was home from the Navy on furlough, at Maugeri's house. At that time Maugeri introduced Tocco to Sam Maugeri, Jr., as Joe Tocco. After dinner on that evening I went to the concession, and then I went to my cottage. Shortly after I had been in my cottage Joe Tocco, Mrs. Maugeri, [29] young Sam Maugeri, Jr., and little Joan Maugeri, who is the daughter of Mr. and Mrs. Maugeri, came in. At times I went to the theater with the Salvatore Maugeris. On one occasion I accompanied Salvatore Maugeri and Joe Tocco to San Francisco. It was sometime in July. We went in a car that Sam Maugeri had purchased for his son. I think it was a Pontiac convertible coupe. Sam Maugeri drove the automobile.

On July 21st I first met a man named Joe Barri on the Boardwalk. He was accompanied by Joe Tocco. Tocco introduced me to Barri under the name of Vicari. He introduced Barri to me as Joe, and he pronounced the second name, but I was not able to catch it. I figured Barri to be about 44 or 45 years of age, and of Italian descent. He was about 5 feet 7 inches or 7½ inches tall and weighed about 160 pounds. He had two small liver marks on the right side of his face and some gold teeth. I saw Barri at Maugeri's house on that same evening, July 21st. It was the birthday of Joan Maugeri. Salvatore Maugeri, the defendant, was there,

(Testimony of Benedict Pocoroba.)

Tocco was there, and other people were present at dinner. On one occasion when I went to Merced, California, to visit with my son, I left the keys to my cottage with Sam Maugeri, telling him that if Tocco and Barri wanted to use my cabin they were at liberty to do so. I was away for about three days.

Barri and Tocco rented a cabin near Felton, in the Santa Cruz Mountains, on the 26th of July. They were there until August 6th. On one occasion I visited their cabin with Mrs. Maugeri and with Joe Tocco, who had come into Santa Cruz to buy some groceries. Mrs. Maugeri and I later returned to Santa Cruz that same evening. I have a son who is a pilot in the Army Air Forces. He is stationed at Merced, California. Early in August of this year I had a conversation with Salvatore Maugeri about the fact of my son being a pilot in the Army Air Forces. [30] At that time Maugeri already knew about my son, having met him on a weekend that my son visited me at Santa Cruz. In August of this year Maugeri and I had a conversation about my son operating an airplane. He asked me if my son could fly out of the country. I told him I didn't know, but that I would find out. The next day I told Maugeri that I had spoken to my son over the telephone and that my son told me he would be allowed to fly to Canada and to Mexico. Maugeri stated that it would be a good chance to fly his plane to Mexico and get a load of opium and bring it into this country.

(Testimony of Benedict Pocoroba.)

On August 8th I had dinner at Maugeri's house. Joe Tocco, Joe Barri, and the other members of the Maugeri family were also present. After dinner we went to the Boardwalk. After strolling around Joe Tocco, Joe Barri and myself went to my cabin and had some coffee. Before leaving my cottage Joe Barri said they were leaving the next day——

"Mr. Abrams: Are you going on and relating the conversation now? If you are, I want to make an objection if it is timely. Are you asking for the conversation?

Mr. Hennessy: Yes.

Mr. Abrams: I object to it as hearsay. Was Mr. Maugeri there?

Mr. Hennessy: No, he was not. We claim there was a partnership.

Mr. Abrams: It is hearsay, then.

Mr. Hennessy: A partnership in crime, a conspiracy between Salvatore Maugeri, Joe Barri, and Joe Tocco, to deal illicitly in narcotics, and that evidence of any one of those three men is admissible against the others in pursuance of the conspiracy.

Mr. Abrams: There is no conspiracy charged here. [31]

Mr. Hennessy: We don't have to charge it; we have a right to rely on the proof of a conspiracy, and that is what we are relying upon in this case. Those men were partners in the illicit business of dealing in narcotics, and an action done by any one of the conspirators in furtherance of the conspiracy is admissible against the others.

(Testimony of Benedict Pocoroba.)

Mr. Abrams: If the Court please, Mr. Hennessy and the men in his office, for some reason far beyond my realization in this matter, have not charged these defendants with conspiracy. They are charged on two counts with violation of the Jones-Miller Act——

The Court: I will sustain the objection for the time being. Maybe if you can connect it up further——

Mr. Hennessy: As a matter of law, we don't have to charge a conspiracy. We can prove the conspiracy as a matter of proof.

Q. For the purpose of the record I will ask you: What conversation, if any, did you have with Joe Barri and Joe Tocco on the evening of August 8, 1944, relative to them leaving Santa Cruz?

Mr. Abrams: Well, now, your Honor has just ruled on that.

Mr. Hennessy: I just asked for the record. You can make your objection.

Mr. Abrams: Well, I have——

The Court: The objection is sustained. Counsel can come back to this afterwards."

The witness testified further: I remained in Santa Cruz and on Thursday evening, August 9th, I again saw Maugeri a little after 9:00 o'clock at his concession. At that time Maugeri asked me if either Joe Tocco or Joe Barri returned to Santa Cruz [32] if I could accommodate them in my cabin. Inasmuch as I had one double bed and one single

(Testimony of Benedict Pocoroba.)

bed, and that if they desired to sleep in the double bed in my cabin they could do so. When I returned to my cabin on that evening Joe Barri was already in my cabin. On Thursday evening, August 10th, Maugeri came to my cabin at about 11:00 o'clock. Joe Barri was present with me. At that time Joe Barri told Sam Maugeri that he had been followed while in San Francisco, and he said, "That is not the proper thing to do, to take me to a strange city, put me on a hot spot and let the police look me over." Sam Maugeri answered that he was crazy, that he did not know what he was talking about, that he had taken him among friends, and that nobody had followed him. Joe Barri then told Maugeri—he said, "Listen, I am from New York, and I know when I am being followed. You don't have to tell me." He said, "Furthermore, what good did it do bringing the grips into your friend's house when he wouldn't give me permission to load the stuff?" Maugeri replied that he had been in too much of a hurry, that he was nervous and excited, that there would have been other ways of loading the stuff. Maugeri then said, "I had the man bring the stuff in San Francisco, and from San Francisco he has to bring it here." Barri told him, he said, "Well, we don't do business like this in New York. Whenever we have a stranger in New York for business purposes we always look after his safety." Maugeri then left the cabin, and Barri remained all night with me. I did not see Tocco on Thursday, August 10th. I saw Tocco on Friday evening, Aug-

(Testimony of Benedict Pocoroba.)

ust 11th, when he came to my cabin with three pieces of luggage, one brown leather suitcase, one black Gladstone, and a blue canvas hand bag. The brown leather suitcase and the blue overnight bag that are now being exhibited to me appear to be the same articles that Tocco brought to my cabin at that time.

[33]

(The brown leather suitcase and the blue overnight hand bag were marked as Government's Exhibits 1 and 2 For Identification, respectively.)

The witness testified further: When Tocco came to my cabin after 9:00 o'clock on that evening with the suitcase and the Gladstone bag and the overnight bag Barri was already there. Tocco and Barri slept in the cabin on that evening. On the following morning, Saturday, August 12th, Maugeri came to my cabin shortly after 9:00 o'clock. A conversation took place, at which Maugeri, Tocco, Barri and myself were present. At that time Maugeri told Barri, "The man is here again and I have already given him the money. Now, it is entirely up to you. You take the stuff or they will dump it in the ditch." At that time Barri said, "I don't know how you people do business in California." He said, "Where do you expect me to pack this stuff, in the street? Your friend in San Francisco won't give me permission to pack it in his house; you won't give me permission to pack it in your house. What am I to do?" Maugeri then got up and said,

(Testimony of Benedict Pocoroba.)

"I am going to work. Think it over and let me know." Maugeri then left the cabin shortly after 9:00 o'clock on that morning. About 5:00 o'clock in the afternoon of that same day Joe Tocco was in my cabin, and he asked me for permission to pack the opium in my place. I agreed. Tocco then left the cabin, and returned in about ten or fifteen minutes. Barri was in the cabin with me at the time Tocco returned. The cabin consists of a combination living and bedroom, a kitchen and a bathroom. In the combination living and bedroom were two beds, a double bed and a single bed. On the previous night Tocco and Barri had occupied the double bed and I had occupied the single bed. After 11:00 o'clock on Saturday evening, August 12th, Joe Tocco and Joe Barri and myself being present, Maugeri came into the cabin carrying a [34] pasteboard box covered by newspaper. He gave it to Tocco, who put it on the floor. Maugeri then went away and came back a few minutes later with another box about the same size, also wrapped in newspaper, and Tocco received it. I then mixed a drink and gave it to Sam Maugeri. He drank it in a hurry and went away. Maugeri had no conversation with Tocco or Barri at this time and place. When Maugeri left he said to Tocco, "I will pick you up at 5:00 o'clock."

"Q. Now, after Salvatore Maugeri left what happened?

A. Well, Joe Tocco reached under the single bed. He had the big suitcase under the bed.

(Testimony of Benedict Pocoroba.)

Mr. Abrams: I am going to object to this as not binding on the defendant.

Mr. Hennessy: It is the concealment of opium which Salvatore Maugeri aided and abetted.

Mr. Abrams: What happened out of his presence wouldn't be binding.

Mr. Hennessy: It is part of the res gestae.

The Court: I will overrule the objection.

Mr. Hennessy: May I have the reporter read the question, may it please your Honor?

(Question read.)

Mr. Hennessy: That is Government's Exhibit 1 For Identification, the tan suitcase that was under the bed? A. Yes, sir."

The witness testified further: Tocco opened the suitcase and took out some brown-colored wrapping paper and some paper tape.

"Mr. Abrams: May my objection go to all this line of testimony the witness is referring to, what took place in the cabin after Maugeri left, and out of Maugeri's presence? [35]

The Court: Very well."

The witness testified further: Tocco produced a small mail scale. They cleared the bureau of all the articles there were on it, and they placed the scales on the bureau, and Joe Barri started to weigh each individual can of opium, and Joe Tocco would mark down the weight.

"Mr. Hennessy: Proceed.

(Testimony of Benedict Pocoroba.)

"A. Joe Barri asked me if I had a pair of gloves, and I told him, 'What do you want the gloves for?' 'Well,' he said, 'in the laboratory'——

Mr. Abrams: Well, just a moment. My objection goes not only, your Honor, to the testimony of the witness as to what occurred, but also any conversation that took place.

Mr. Hennessy: It is all part of the res gestae.

The Court: Since the first objection was made, I will overrule your objection. You may have an exception.

Mr. Abrams: All right; exception, your Honor.

A. (continuing): Joe Barri said, 'In the laboratory we always use gloves so that we don't leave any fingerprints in the cans or on the utensils.'"

The witness testified further: I told him I had no gloves, but I offered him a pair of very new socks. He tried to work with the socks, but he couldn't, so he just used his bare hands. They weighed each can separately and they marked the weight on a piece of paper, and then they started to wrap it in brown wrapping paper into bundles and tied the bundles with gummed paper tape, and then put the bundles in the brown leather bag and the blue overnight bag. The big bag was then placed under the bed and the small bag on a chair. They finished weighing the cans around 1:00 o'clock, which would then be Sunday morning, August 13th. I went to bed at that time. The cans which they had wrapped [36] were the ordinary 5-tael cans in which opium is usually packed, familiar with the size and appearance of

(Testimony of Benedict Pocoroba.)

them. I retired in the single bed at about 1:00 o'clock, and Barri and Tocco did not retire until 2:00 o'clock. They occupied the double bed in my cabin. At about 3:30 somebody rapped at the door and Joe Tocco went to the door and opened it, and Sam Maugeri said, "Let's get the grips and let's go." Tocco was dressed; he hadn't undressed for the night, but he had taken his shoes off. Tocco then took the brown leather suitcase, Government's Exhibit 1 For Identification, and the blue overnight bag, Government's Exhibit 2 For Identification, and left the cabin. Barri and I remained in the cabin. I have seen the two cardboard boxes you are exhibiting to me before. Here are the marks I put on each cardboard box. These are the two cardboard boxes brought into my cottage by Sam Maugeri with the opium on the night of August 12, 1944, at Santa Cruz.

(The two cardboard boxes were then marked U. S. Exhibits 3 and 4 in evidence, respectively.)

The witness testified further: Barri and I got up about 8:30 that morning, dressed and had breakfast, and then went out of the cabin at about 9:30. We took a walk around and then we went back to the cabin. Subsequently we left the cabin. Barri wanted to go to the bus depot to consult a time table. He fixed his Gladstone bag and we took a taxi and we drove to the bus station. I left him there around 11:00 o'clock or thereafter on Sunday morning, August 13, 1944, and I have not seen him since.

(Testimony of Benedict Pocoroba.)

Upon leaving Barri at the bus depot I endeavored to contact some of the Federal narcotic officers who I knew were in Santa Cruz, by telephone, and nobody answered. I then took a taxicab and went to the Casino, hoping that I might meet one of them. [37] Upon leaving the taxicab I saw Sam Maugeri coming down the hill with some friends of his. The time was then about 11:30. I walked with Maugeri and his friends to his concession. I stood there just as short a while as I possibly could and then I got to a telephone and I contacted Agent Newman, and I made an appointment with him. I later met him and other narcotic agents and reported what happened. Later that day I went to San Jose and contacted the District Supervisor, Major Manning, and made a report to him. I later went to the Oakland Mole in an effort to locate Tocco on any train leaving for the East and was unable to find Tocco. I then left San Francisco late Sunday evening for Santa Cruz, arriving there at 1:00 or 2:00 o'clock on Monday morning. I immediately went to my cabin. There were present at that time at the cabin Vance Newman, Thomas McGuire, Earl Smith, from the Bureau of Customs, and Jess Braly. Upon arriving at the cabin I delivered the two cardboard boxes with the traces of opium in them, U. S. Exhibits 3 and 4 in evidence, and the brown wrapping paper, and the brown gummed paper tape which you are now exhibiting to me to Agent McGuire in my cottage on Monday morning, August 14th.

(Testimony of Benedict Pocoroba.)

"Q. Where did you obtain this brown wrapping paper and this gummed paper?

Mr. Abrams: My objection to this line of testimony in respect to this paper and gummed tape carries the same objection I made to the other answers, that it is not binding on the defendant and is incompetent, irrelevant, and immaterial.

The Court: All right.

Mr. Hennessy: May I have the reporter read the last question, your Honor?

(Question read.)

Mr. Hennessy: Q. Where did you get it? [38]

A. The brown paper and the brown paper tape were left in my cottage by Joe Tocco and Joe Barri after they used whatever portion they needed to wrap the cans of opium.

Mr. Hennessy: I will offer this brown paper and also this gummed tape in evidence and ask they be marked Government's Exhibits; for the paper, No. 5 in evidence, and the tape, No. 6 in evidence.

Mr. Abrams: I will object as incompetent, irrelevant, and immaterial, and not binding on the defendant.

The Court: Objection overruled. You may have an exception.

Mr. Abrams: All right; Exception, your Honor. Thank you.

The Court: The exhibits may be admitted."

(The brown paper was marked U. S. Exhibit 5 in evidence; the gummed paper tape was marked U. S. Exhibit 6 in evidence.)

(Testimony of Benedict Pocoroba.)

The witness testified further: I then returned to San Francisco on Monday. Later, on Wednesday afternoon, August 16th, I returned to Santa Cruz.

"Q. Did you see Salvatore Maugeri?

A. I did, sir.

Q. Where? A. At his concession.

Q. On the beach? A. Yes, sir.

Q. At about what time?

A. Oh, I think it was about 4:00 o'clock.

Q. Did you have any conversation with him about Joe Tocco?

A. Yes, I asked Sam Maugeri if he had heard——

Mr. Abrams: Now, just a moment. This would, I take it——

Mr. Hennessy: It is an admission against interest.

Mr. Abrams: Apparently this was at the date of the alleged offense stated in the indictment.

Mr. Hennessy: Yes; it is an admission against interest. [39]

Mr. Abrams: It can't be an admission against interest in this case; it is a statement made subsequent to the date of the alleged offense in the indictment.

The Court: There is no question, is there, that if you have a later conversation with the defendant after the commission of the offense—I will overrule the objection. You may have an exception.

Mr. Abrams: Exception, your Honor.

(Testimony of Benedict Pocoroba.)

Mr. Hennessy: Q. What conversation did you have, if any, with Maugeri?

A. I asked if he heard from the boys, and he said, 'No,' and he said, 'If I don't hear from them again I would be glad. They are certainly lousy. Joe Tocco was introduced to me by a friend of mine, and the others were lousy.' And I asked him where he took Joe Tocco and he said to Berkeley.

Q. Did you participate in the arrest of Salvatore Maugeri? A. No, I didn't, sir.''

Cross-Examination

While in Santa Cruz I used the name of Vicari as my last name and Benedict, or Benny, as my first name. My real name is Benedict Pocoroba. I was born in Sicily and speak the Sicilian dialect, but I understand most of the dialects. Sam Maugeri, Joe Tocco and Joe Barri do not come from the same part of Italy that I came from. Maugeri said he came from Calabria, which is on the peninsula forming the toe of the map of Italy. Barri was from Puglie, which is in the southern part of Italy, close to Sicily. Tocco speaks Sicilian. Maugeri, Tocco and Barri all spoke Italian and I understood it. At times we conversed in Italian. I came from Chicago to San Francisco, leaving Chicago April 23, 1944. I arrived in Santa Cruz on May 1, 1944. I am an agent of the Narcotic Division in Chicago and I was di- [40] rected by my supervising director to come to San Francisco and to report to the supervising director at San Francisco, which I did. Before leaving Chicago I did not know a man by the

(Testimony of Benedict Pocoroba.)

name of Lagaipa, nor do I remember ever having heard of such a man. Upon arriving in San Francisco and reporting to the supervising director here I took orders from him and worked under his supervision, and with the cooperation of other Federal narcotic agents of this district, including Vance Newman and Thomas McGuire. I was acting in the capacity of an undercover agent for the Narcotics Division under the supervising director in San Francisco.

Shortly after arriving in San Francisco I learned of a man by the name of Lagaipa, who was at that time understood to be in or about Santa Cruz. Lagaipa was recently from New York, and I was advised that he was known to have trafficked in narcotics in New York for some long period of time. I was also told by my supervising director shortly after my arrival in San Francisco of a man named Joe Tocco, who was also from New York, and who is a co-defendant in this case, who has already entered a plea of guilty to the charge contained in this indictment. I learned that Lagaipa at that time was living at an address in Santa Cruz. I was informed that Lagaipa, upon arriving in Santa Cruz, some three years before, from the East, had engaged in business, but at the time I arrived there he was no longer in business. I learned that Lagaipa was acquainted with Maugeri, and that Lagaipa had received his mail at Maugeri's house. I also learned that Joe Tocco was acquainted with Maugeri. I do not know of the contents of the mail that was re-

(Testimony of Benedict Pocoroba.)

ceived by Lagaipa at Maugeri's house, just the fact that mail was received there. Lagaipa, after coming here from the East and going to Santa Cruz, and establishing himself there with [41] his family, went into the restaurant and bar business for a period of time. I first met Joe Barri in Santa Cruz. The moment I met him I could see by his way of speaking that he was from New York. However, I ascertained that both Barri and Joe Tocco were from New York, and also Lagaipa. The files showed that Lagaipa was a man with a long criminal record in New York involving narcotics. My purpose in going to Santa Cruz as an undercover agent and under the assumed name of Vicari, was to conduct an investigation of people who were under suspicion of trafficking in narcotics and by keeping my identity secret I hoped to obtain information concerning such trafficking in narcotics. During this investigation, if narcotics had been offered for sale to me I would have bought them with funds provided by the Narcotics Division, in order to apprehend anyone trafficking in narcotics. When I first arrived in Santa Cruz I registered at the Graystone Hotel under the name of Vicari, and from that time on I was known to everybody down there by that name. Of Lagaipa, Maugeri, Tocco and Barri, after my arrival in Santa Cruz, Maugeri was the first one whom I met. I had been advised that Maugeri had a concession on the Boardwalk, and I went looking for him. At that time I also knew Lagaipa was in Santa Cruz, and I had his home address. At that

(Testimony of Benedict Pocoroba.)

time I had been advised that Maugeri and Lagaipa were friendly. I had been in Santa Cruz about a week before my first contact with Maugeri, which was on the evening of May 7th, at his concession on the Boardwalk. At that time I just said "Hello" to him, while I watched my son and a bunch of young officers play the game at Maugeri's concession. At that time my wife was with me and my son, and he had a bunch of young officers there, and at my instigation they were playing at Maugeri's concession. I had my son make a special trip to Santa Cruz from Merced, California, for the purpose of assisting me in this way. It was [42] at my suggestion that he brought his friends, and we then went to Maugeri's concession for the purpose of striking up a conversation with Mr. Maugeri and becoming acquainted with him, which I did. I then saw Maugeri on the Boardwalk at his concession each day that he was operating. I had my son and his friends play so that I could become well acquainted with him, and to obtain his confidence, which I succeeded pretty well in doing; so well, that it was not many days before I was eating at Maugeri's house on an average of twice a week. In the process of becoming better acquainted with Maugeri, and in order to work into his confidence, I let him know I was an Italian, that I spoke Italian, and probably came from the same part of Italy. Among other things we talked about, I told him I was in an automobile accident, and that I had come to California from Philadelphia, Pennsylvania. I also

(Testimony of Benedict Pocoroba.)

told him that I had been in El Paso, Texas. I did not tell Maugeri that I had come here for my health. I told Maugeri that I had a son who was in the Air Force, and that being stationed in Merced, California, he visited me on week ends. I also told Maugeri that I had difficulty in eating on account of my jaws, that I had been having trouble with my jaws. Maugeri invited me to his house, where I met his family, which consists of three daughters and a son, all of whom I met. Maugeri's son is in the Navy. I dined frequently at the Maugeri home, and once a week I used to buy chicken and bring it over there, and Mrs. Maugeri prepared it. At the beginning I asked Maugeri if I could board at his home. I was treated like one of the family, and the Maugeri children addressed me as "Uncle Benny." I did present things to the children, and was considered or thought of as one of the family by the children, as well as Sam Maugeri. At times I accompanied Mr. and Mrs. Maugeri and the children to shows. I accompanied Mr. and Mrs. Maugeri to [43] San Francisco. On one occasion, the night of July 8th, when Sam Maugeri, Jr., came to Santa Cruz on a furlough Mrs. Maugeri visited at my cabin with her son and Joan and Joe Tocco.

I indicated to Sam Maugeri that I was retired, and that I was living on an income of about $500 a month out of real estate. Maugeri indicated his desire to have an income like that, and to be able to live like that. Whenever I ate at Maugeri's house

(Testimony of Benedict Pocoroba.)

and he would be driving down later, why, naturally, I would drive with him to my home. During the time of my acquaintance with the Maugeri family I observed that Sam Maugeri went to his concession on the Boardwalk mostly every day. He generally went about nine or ten o'clock in the morning and sometimes stayed all day. He would go home for dinner and then return in the evening to his concession, and he would be there until late at night, sometimes closing at twelve or one o'clock. At times his daughters would help him at the concession. At times I went to the concession and assisted him in picking up the rings and worked right along with him. Sam Maugeri told me that he had worked in the concession there for quite a few years.

About a week after I first met the defendant Maugeri I met Lagaipa at Maugeri's house. I am absolutely sure it was not at Maugeri's concession that I met Lagaipa, but at Maugeri's house. The date was May 22, 1944. I attempted to become as well acquainted with Lagaipa as I could, pursuant to my instructions. I attempted to gain his confidence and find out what I could about Lagaipa, what he was doing in Santa Cruz, if he was trafficking in narcotics, and to attempt to capture him if I could. Lagaipa was an Italian from Southern Italy, and he and I spoke the same language, and in that way it was easy for us to become friendly. However, I never became very well [44] acquainted with Lagaipa, at least not as well acquainted with Lagaipa as I became with Maugeri. I attended a show with

(Testimony of Benedict Pocoroba.)

Lagaipa once. I never visited at Lagaipa's house, but he drove me to my cabin the night of May 22nd. We went to the show together with the Maugeri family on that evening, and after the show we went back to the Maugeri house and we had some peaches and some coffee royals, and it was pretty late at night, so Charlie Lagaipa drove me to my cottage. The last time I saw Lagaipa was either May 30th or June 2nd, and I haven't seen him since. He disappeared mysteriously and supposedly has been killed. He has not been seen by myself or other agents since that time.

It was on the 6th of June, 1944, that Maugeri started talking to me about narcotics, which was about a month after I had first met Maugeri. The subject started when Maugeri said he had been convicted for counterfeiting in 1935 and that the counterfeiting racket was lousy, the only ones that made money are the ones that print the money. He said he would sooner deal in narcotics than in counterfeit money. At that time our files showed Maugeri's criminal record, and I had known of Maugeri's record before he told me. Maugeri was the first one to mention narcotics, and I don't know what brought it about; it was just daily association, and talking about various rackets and this and that, as naturally you do when two oldtimers get together, and as I thought it was my duty to talk about rackets while here working on this Maugeri case. I told Maugeri about my $500-a-month income, and Maugeri won-

(Testimony of Benedict Pocoroba.)

dered how I was getting such a nice income every month, and he kind of envied me and wished he had an income like that, he was just a poor man, and had a big family to take care of, and wondered how I did so well. I told Maugeri at that time that I used to be in the [45] narcotic racket in New York, that that is where I used to make my money. I told him that to get into his confidence. It was then that he asked me a question about narcotics.

In my earlier testimony I said that I am not crippled. I did not tell Mr. Maugeri I was crippled. I don't consider myself crippled. I am physically impaired, but not crippled. That is the condition I spoke about concerning my jaws. I have a scar on my left leg that is observed when I am in my bathing trunks. Maugeri could see it. Tocco, naturally, saw it also. I did not show the scar in any particular way when talking about my crippled condition. It was evident. I didn't make a special show of it. On only one occasion did I go to the show with Lagaipa. At that time Mr. and Mrs. Sam Maugeri, Joan Maugeri and Jean Maugeri accompanied us. On other occasions I went to the show with members of the Maugeri family alone, but only once with Lagaipa. I have attended shows with Tocco and Barri together.

During the month and six days that I was working myself into Mr. Maugeri's confidence and Mr. Lagaipa's confidence before talking about narcotics on June 6th, I had not seen Tocco then. At about the time we began to talk about narcotics, I did men-

(Testimony of Benedict Pocoroba.)

tion that I had dealt in narcotics in a substantial way before in New York. I let Maugeri believe I had been a sizable narcotics dealer in the past in New York. I also, in order to gain his confidence, let Maugeri believe that I used to import the stuff from Germany, and that I used to have someone on the boats that used to pay off and take care of things for me on the boats; also, that I had a good contact, narcotic contact, in Chicago, and that if he, Maugeri, had some stuff out here that I had a good contact in Chicago, somebody there who would take it off his hands. Maugeri, in my mind, was to be the source of supply, [46] that is where the stuff was supposed to come from, and then to be disposed of elsewhere, either Chicago, or Texas, or some other place. In that connection I let Maugeri believe that I had a contact with somebody in Chicago who could take the stuff if he could get it. I told Maugeri that I had written a letter to Chicago in connection with my efforts to dispose of narcotics there, to find an outlet for narcotics there. Shortly after that I showed Mr. Maugeri a letter which was supposed to be an answer to the letter I had told Maugeri I would write, but which, in fact, I had not written, but which was part of the plan. Mention was made in the letter about El Paso, that somebody had sent some stuff, meaning narcotics, to the same party, or somebody, in El Paso, Texas, before, and that it was not very good stuff, something was wrong with it, and requesting a sample this time, and if the sample

(Testimony of Benedict Pocoroba.)

was good, or O. K., they might consider buying it. There was no mention in the first letter, or the answer to the first letter, about the price quoted as being too high, or not wishing to pay for the stuff in advance, that that was not the way they did business in Chicago. I showed Mr. Maugeri a second letter which was also written in Italian, and that was supposed to have come from the same party in Chicago. I will produce these letters for you.

In speaking of these narcotics to Mr. Maugeri, an Italian pronunciation was given to the words "tomato paste."

After the initial visit of my son from Merced, California, when he came with some friends I did not meet the friends any more, but, naturally, my son came several times to visit with me in Santa Cruz by himself on week ends. On one occasion he visited at the Maugeri house. He never met Tocco and Barri. My son is an instructor pilot in the Air Corps and has about 1700 hours in the air right now. I did not tell Mr. Maugeri, as [47] part of my plan, that my son in the Air Force made trips, and that it would be very easy for him to go to Mexico or Canada and get opium and hide it in the plane, and nobody would suspect him because he was an Army pilot and was in the Army Air Corps. There was some talk about that, but it was Maugeri's suggestion. He asked me if my son could fly out of the country, and I told him that I didn't know, I had to find out from my son. Afterwards I told him that my son had told me that he was allowed to fly to

(Testimony of Benedict Pocoroba.)

Canada and Mexico, and it was then that Maugeri expressed the idea of having my son go down to Mexico with his plane and load it up with opium and bring it in. I then said I would have to talk to my son about it, which I did, and my son was tickled to death, he wanted to go through with it. I did not have my son talk to Mr. Maugeri about that, but I did talk to the district supervisor, Mr. Manning, and he dissuaded me from the idea because it was not practicable; he did not think I could get permission from the Army Air Corps to get mixed up in a dope deal. I did have in mind having my son actually make such a trip. He wanted to talk to the Army Intelligence and get permission from them, but Mr. Manning said he didn't think the Army would sanction that. I was perfectly willing to go ahead with such a scheme, using my son for that, if I could have gotten permission from the Army, or Mr. Manning. My son is 23 years of age. I did tell Mr. Maugeri that I would probably arrange with my son to do that.

On the 9th of August, when Tocco and Barri were driven to San Francisco by Mr. Maugeri, I believed from what they indicated to me that they were leaving for New York, or the East. However, a day or two following that I saw Barri back in Santa Cruz. He stayed in my cabin that night. I had met Mr. Maugeri on the Board walk and at that time I did not know that Barri and Tocco [48] were back in Santa Cruz, or that they intended to come back, as I thought they were on their way to New York. It

(Testimony of Benedict Pocoroba.)

was at this time that Maugeri asked if either one of them came back if they could use my cabin, or stay at my cabin, and I gave permission for them to do so. I then immediately went to my cabin and found that Barri was already there. I don't know how long he had been there. It did not occur to me that Maugeri just assumed I would give them permission and that it was a needless act to ask me. I figured Maugeri would feel that I naturally would not refuse them permission, but, naturally, that he would ask me permission before the men could get in there. Barri was already in my cabin at the time Mr. Maugeri was asking my permission.

On the several week ends that I left Santa Cruz and said that I was going to visit my son in Merced I actually went to San Francisco to discuss matters with my office.

On the night of August 9th, when I got to my cottage and found Barri there, Barri was so nervous he was not able to go out, he was afraid to go out the door, so he asked me to go to Sam Maugeri to get in touch with somebody in San Francisco to see that Tocco got safely back to Santa Cruz. Maugeri gave me a telephone number to call, which was a saloon at 1371 Grant Avenue. Maugeri was too busy working at the concession at the time and did not have an opportunity to phone, himself. The reason that Mr. Barri wanted to phone to Tocco in San Francisco was to tell him to bring the suitcases back.

(Testimony of Benedict Pocoroba.)

When Tocco first came to Santa Cruz he stayed at the home of the defendant, Maugeri, and later got a cottage of his own with Barri at Felton, in the Santa Cruz Mountains, where they lived from July 26th to August 6th. They then returned to Maugeri's house. Joe Barri stayed in my cabin from August 10th until the [49] morning of the 13th, at eleven o'clock. Tocco stayed in my cabin from the night of the 11th to the early morning of the 13th. Before that time Tocco frequently used my cabin for the purpose of dressing and undressing when going to the beach. When Barri first came to Santa Cruz he also stayed at Maugeri's house for a short period, and then he later lived with Tocco. I arrived in Santa Cruz on May 1st and went to the Graystone Hotel, where I lived from May 1st to May 22nd. I then moved to the Miller Apartments and was assigned Apartment 4, where I remained until the time I left Santa Cruz, which was the 14th of August. I have already testified about visiting the Maugeri home during all of this time, and eating there, and socializing with Maugeri and his family, and also seeing Maugeri on the Boardwalk almost daily, and at times helping him out at his concession. I have also testified that Mrs. Maugeri visited my cabin on one occasion with her son and little daughter and Joe Tocco. Maugeri never visited me at the Graystone Hotel, but he came once in a while to the Miller Apartments. Occasionally he came from the Boardwalk to my apartment, and had a drink with me.

(Testimony of Benedict Pocoroba.)

On Saturday, August 12th, which was during Maugeri's busy season at the concession, Maugeri came to my cabin about nine o'clock in the morning and stayed ten or twelve minutes. He left, saying he was going to his concession. I saw him at his concession during the day, but I did not go down to the Boardwalk during the evening. Around eleven or eleven-thirty that evening Maugeri carried U. S. Exhibits 3 and 4 in evidence into my cabin one at a time. Each of the cartons was full of opium cans and a newspaper was tucked in at the top of each carton, underneath the top flap. All I could see at that particular time was the exterior of each of the closed cartons. Maugeri handed the cartons to Tocco and Tocco then put them on the floor. Maugeri then [50] just had time for a drink and left.

"Q. Now, at that time, while Mr. Maugeri was there, you did not see anything inside the boxes, the boxes were just put on the floor and left there, and they weren't disturbed until after Mr. Maugeri left?

A. That is right.

Q. They were not opened until after Mr. Maugeri left? A. That is right.

Q. All you saw were the cartons in that condition? A. That is right.

Q. And nothing was said about them, they were just left on the floor, and left there, and Mr. Maugeri had a quick drink and left?

A. That is right.

Q. Although, in fairness to you, you did say

(Testimony of Benedict Pocoroba.)

something about Maugeri saying, 'I will be back at 5:00.' A. At 5:00 o'clock.

Q. 'I will see you at 5:00 in the morning,' or just 'at 5:00'?

A. Just at 5:00, something like that."

The witness testified further: When Maugeri came to the house at that time I was in the living room, or the bedroom, whichever you wish to call it, because it is a combination living and bedroom. As you open the front door you enter the combination living and bedroom. There is a kitchen on the right and the bathroom is to the left. I was near the kitchen door at the time Maugeri came to the cabin. I was probably eight or nine feet from the front door when he entered. I was not doing anything in particular, maybe lighting a cigarette. I was dressed. The lights were on. It was dark outside. At that time there was a knock on the door and Barri opened the front door. Both Barri and Tocco had been in the cabin with me prior to this time for the entire evening, with the exception that Tocco had left shortly after five o'clock for ten or fifteen minutes, but had [51] come right back. Tocco did not bring these boxes into the cabin.

"Q. Are you sure about that?

A. Absolutely sure.

Q. Isn't it a fact that Tocco carried one box in first and then went right out again and brought the other box in, and Mr. Maugeri happened to be coming into your house at just about the same time?

A. No, sir.

(Testimony of Benedict Pocoroba.)

Q. It was just a coincidence that Mr. Maugeri happened to be coming down to your place at that time? A. No, sir.

Q. Just to have a drink with you and go back to the concession?

A. He had the drink all right, but he brought the boxes in.

Q. He went right back to his concession after he had the drink? A. Yes.

Q. And worked until about 1:00 or 2:00 o'clock?

A. I don't know how late he worked."

The witness testified further: I did not see anybody else outside the house at the time the boxes were brought in, nor did I hear any noise outside of cars, trucks, or anything. I heard no voices and did not see anyone else except Maugeri when he brought the cardboard boxes in one at a time and gave them to Tocco, who put them on the floor. Maugeri then left. I did not watch to see where he went, although the door was partly opened, because I did not wish to appear suspicious. I do not know if any agents were watching the premises at that time. Later I ascertained from discussions with Mr. Newman and the other agents that my cabin and the premises surrounding it were not under surveillance at that particular time, so none of the agents were able to observe what was taking place in front of the cottage, or about the cottage at that time. I did not see where Mr. Maugeri had come from when he came in with the first box, or where he went to

(Testimony of Benedict Pocoroba.)

get the second box which he brought into the [52] cabin. He was gone a very short while after bringing the first box in, and then returning with the second box. I would say he was gone maybe five minutes in getting the second box.

The can which has just been removed from one of the pieces of luggage and which has just been marked Defendant's Exhibit A For Identification is what is referred to as a 5-tael can. I observe the tape around the can, which is a seal.

"Q. Well, now, while Mr. Maugeri was in the house that evening, Saturday evening, after he had brought these two cartons in, at the time he was in the house for about five minutes or so, was that about the length of time he was there?

A. After bringing the second box.

Q. After bringing the second box, yes.

A. Yes.

Q. About five minutes?

A. Enough time to have a drink.

Q. You didn't see those cans and those two cartons during that time?

A. While Mr. Maugeri was there?

Q. Yes, you did not see them during that time?

A. No, sir.

Q. But after Mr. Maugeri had left you observed Barri and Tocco weighing and wrapping cans up, is that right? A. That is right.

Q. Are these the cans? They were cans similar to this Exhibit, here? A. Yes, that is right.

Q. And cans in this condition?

(Testimony of Benedict Pocoroba.)

A. That is right.

Q. Just like this appears, without any writing or anything appearing on the face or the side of the can? A. That is right.

Q. Just plain cans?

A. Plain cans like that.

Q. All taped up? A. Taped up.

Q. Sealed up? A. Sealed up.

Q. And these were being wrapped in paper, is that right? A. Brown paper. [53]

Q. By Barri and Tocco? A. That is right.

Q. But after Maugeri had left and not while Maugeri was in the house? A. That is right.

Q. You mentioned something yesterday in your testimony about—you sort of said quickly at the end of one of your sentences, you were saying there were some traces of opium in the boxes or something.

A. That is right.

Q. That is what you said? A. Yes, sir.

Q. What did you mean by that?

A. As you see, the cans at times leak and naturally the opium sticks to the box.

Q. Where were these traces found?

A. At the bottom of the box.

Q. At the bottom of the box?

A. That is right.

Q. But that was after Mr. Maugeri had left and after the cans were taken out of the cartons and wrapped, isn't that true? A. That is right.

Q. And that was probably not found until sev-

(Testimony of Benedict Pocoroba.)

eral days later, after you came back with the agents to your house or cabin and turned the cartons over to the agents? A. That is right.

Q. Early in the morning the next day?

A. Yes.

Q. They were just little specks, you might say?

A. Just a small coagulation of opium.

Q. Specks?

A. I wouldn't say specks; they probably wouldn't be noticeable to the average person. To the uninitiated it might look like tar or anything.

Q. An agent could find it only by making a minute inspection of the boxes?

A. No, they were plainly visible; I believe you can see them now, you can see them yet.

Q. You can still see them in there?

A. I imagine if you look, unless the chemist scratched them off (witness inspects cartons). [54]

Q. Is it still in there?

A. Yes, there is a little bit there.

Q. You mean that stuff that looks like tar?

A. That is right.

Q. And the stuff at the bottom, here, that looks like tar, that black stuff?

A. Yes, the black stuff; see, there is a good chunk here.

Mr. Abrams: May I offer these boxes to the jury for their inspection?

Mr. Hennessy: No objection.

The Court: All right, pass them around to the jury.

(Testimony of Benedict Pocoroba.)

(The boxes were passed to the jury for inspection.)"

The witness testified further: On this Saturday night that Maugeri brought these two cartons into my cabin and gave them to Tocco, who placed them on the floor, I knew what was inside these boxes.

"Q. You had not seen what was in the boxes?

A. I had not seen, but I knew it.

Q. You knew what was in the boxes?

A. Yes.

Q. How did you know that?

A. Because Barri told me he had come there and laid out $22,000 for 100 cans of opium.

Q. You say Barri came——

A. To Santa Cruz with $22,000, which he gave to Maugeri for the purchase of the opium, and naturally would receive the opium. All the while he had been talking about receiving the opium.

Q. In other words, you believed that Barri had come to Santa Cruz to buy opium?

A. Sure; he told me so."

The witness testified further: I first knew about five o'clock on that Saturday night that the boxes were to be brought to my cabin that night. I did not tell any of the other agents because I was in the company of Tocco and Barri, and from five [55] o'clock that evening on I did not leave my cabin for a single minute, as it was Barri's suggestion that we all stay in, Tocco, Barri and myself, not to go out and attract attention, because he was afraid

(Testimony of Benedict Pocoroba.)

of being followed. I could not find any pretense at all to go out and notify the other agents. That may be why the other agents were not watching my place that night. At that time there were in Santa Cruz Agent Newman, of the Narcotic Bureau, Agent McGuire, of the Narcotic Bureau, Mr. Braly and Mr. Smith from the Bureau of Customs. They were all staying at the Monte Carlo Inn, which is about ten blocks from my cabin. They had been staying at various places in Santa Cruz during the months that the investigation was being conducted. Some of the agents had been in Santa Cruz before I got there in May. It was their job to watch me and my movements and to see as much as they could and to observe as much as they could in the way of narcotic violations and to catch anybody that they could catch in the act. On this particular Saturday night when I knew at least from five o'clock on that narcotics were supposed to be brought to my house no agents were around the place, and I did not get word to them. During that day I had talked to Newman on the telephone and discussed different things that were happening. However, we used to meet on the Boardwalk, or they would come by my place and talk to me, or I would call them on the telephone. We were in close touch during all these months, so from day to day they were kept informed right up to the moment of what was happening. They had previously told me about Tocco and Barri being trailed to San Francisco while riding with Maugeri, and about the grips in the car. I told the

(Testimony of Benedict Pocoroba.)

other agents that Barri was getting nervous and that he said he was being followed in San Francisco, and that things were hot and that the deal was off. I had discussed with the other agents [56] the facts that a narcotic transaction was brewing, and that it was getting close to the time when something was supposed to take place in the way of a narcotic transaction.

"Q. Yet on that Saturday or that evening the agents weren't around your place?

A. I can't help that.

Q. Well, you knew they weren't there, they didn't see Mr. Maugeri come in with these boxes?

A. Well, that is their business, not mine.

Q. They didn't see whether anybody was out in front of your place? A. I don't know.

Q. Or if anyone helped Mr. Maugeri bring the boxes in, or anything? Nobody saw that, to your knowledge? A. I don't know."

The witness testified further:

"Q. Mr. Maugeri didn't return to your place, your cottage, that night, at all, did he?

A. I didn't see him.

Q. Saturday night? A. I didn't see him.

Q. You say that Tocco and Barri then wrapped these things up and put them in the suitcase and went to bed? A. Yes, that's right.

Q. And you went to bed?

A. I went to bed before them.

Q. What time did you go to bed?

A. Around one o'clock.

(Testimony of Benedict Pocoroba.)

Q. In the morning? A. In the morning.

Q. You went to bed first? A. That's right.

Q. Did you fall asleep? A. No, I didn't."

The witness testified further: I had taken my clothes completely off and I had my pajamas on. I was in bed in the same room in which they were working. I did not go to sleep until atfer Tocco left, about 3:30.

"Q. Did you have any refreshments before you went to sleep that night?

A. Oh, we had a couple of drinks with [57] Tocco; Barri doesn't drink.

Q. But you and Tocco had some drinks?

A. A couple of drinks.

Q. How many? A. A couple.

Q. What did you drink?

A. Whisky and lime ricky."

The witness testified further: I did not drink any sherry wine that night. It is not a fact I consumed a whole bottle of sherry wine by myself. When I retired about one o'clock I was not feeling the effects of liquor. I was able to simulate sleep without Tocco and Berri noticing it. That is very easy, there was nothing hard about it. The bed in which they slept was in the same room, and not very far from my bed. They did not suspect that I was awake.

"Q. At three o'clock in the morning, or three-thirty, you say somebody knocked at the door?

A. Yes.

Q. Was it dark outside? A. Sure.

(Testimony of Benedict Pocoroba.)

Q. Was it dark inside?

A. Yes; the lights were out.

Q. They were not put on? A. No.

Q. Tocco left? A. Tocco left.

Q. Was Barri still asleep?

A. No, he was not.

Q. He was awake? A. Yes, he woke up.

Q. Said nothing?

A. Yes. He said, 'Be careful.'

Q. 'Be careful.' Somebody had knocked at the door? A. That's right.

Q. Did the person who knocked at the door come into the place? A. No, he didn't.

Q. All you heard was a knock?

A. And a voice.

Q. And a voice? A. Yes.

Q. What did the voice say?

A. 'Get your grips; let's go.'

Q. 'Get your grips; let's go'? A. Yes.

Q. That is all? A. That is all. [58]

Q. And with that Tocco took the grips and walked out? A. Yes.

Q. Rather quickly?

A. Yes; just took time enough to put his shoes on, tie them up and go out.

Q. And Tocco carried the grips out of the cabin?

A. Yes.

Q. All you could see or hear at that particular time, three-thirty Sunday morning, around three-thirty, was a knock on the door in darkness—dark-

(Testimony of Benedict Pocoroba.)

ness both inside and out, a knock on the door, a voice saying, 'Get your grips; let's go'; Tocco took the grips and left the house, or your cottage?

A. That's right.

Q. That is all you saw and heard?

A. That's right.

Q. At that time? A. That's right.

Q. At that particular time, to your knowledge, were any of the agents who were working in cooperation with you down there in or about your house?

A. I don't know.

Q. Were they in your house?

A. No, they weren't.

Q. No agents were in your house? A. No.

Q. To your knowledge they were not outside either, were they? A. I don't know.

Q. In the immediate environs?

A. I don't know.

Q. Well, to your knowledge?

A. I don't know. I was inside.

Q. Well, you found out afterward they weren't there? A. That's right.

Q. Afterwards you found out the agents were not there? A. That's right.

Q. They were not there that night, they were not there that morning? A. That's right.

Q. Nobody was there to observe who was in front of the house or who was there at that time; there was nobody there to observe it?

A. That's right. [59]

(Testimony of Benedict Pocoroba.)

Q. Neither you nor the agents observed what Tocco did from the time he left your house at three-thirty in the morning there? A. Right.

Q. None of the agents or yourself observed his movements or who he was with or where he had gone after he left your house with those grips at three-thirty in the morning on Sunday?

A. That's right.

Q. That would be Sunday, August——

A. 13th.

Q. 13th. You said you went to sleep then, is that it? A. Yes.

Q. Did you really go to sleep then?

A. Yes.

Q. You say you fell asleep then? A. Yes.

Q. How long did you sleep?

A. We got up about eight-thirty.

Q. You and Barri? A. Joe Barri.

Q. Rose at eight-thirty? A. Yes.

Q. What did you do then?

A. We dressed, we shaved, and we had breakfast.

Q. At home? A. Yes.

Q. Then what did you do?

A. Then we went out for a walk.

Q. Then you went out for a walk? A. Yes.

Q. You and Barri? A. Yes.

Q. Where did you go? A. Around——

Q. The beach?

A. No, not on the Boardwalk but around the back of the cabins.

(Testimony of Benedict Pocoroba.)

Q. About two or three blocks?

A. Longer than that.

Q. How long were you out of your cottage?

A. I would say maybe an hour, maybe an hour and a half.

Q. Did you stop in any place? A. No.

Q. Didn't go in any place? A. No.

Q. Then you came back to the cabin?

A. Yes.

Q. About nine-thirty?

A. No; it must have been later than that. [60]

Q. A little later? A. Later."

The witness testified further: Joe Barri had a bus time-table and he consulted the bus timetable and expressed the idea of going to the bus station, so he finished packing his Gladstone bag and we got a taxicab and went to the bus station. I left him at the bus station. Barri was not observed by any of the other agents leaving the house with me and he was not observed by me or any of the agents at all after arriving at the bus station. Neither myself nor the other agents know where Barri went, after I left him at the bus station. Barri was named in the indictment in this case but as far as I know he is still a fugitive. After leaving Barri at the bus depot I went to the Arcade and got a telephone booth and called up the agents at the Monte Carlo Inn. Nobody was home at the time. It was just about ten or fifteen minutes to eleven. I took a taxicab and went to the Casino, thinking that I would go along the Boardwalk and possibly meet some of the agents.

(Testimony of Benedict Pocoroba.)

As I got out of the taxicab I saw Maugeri coming down the hill from his house with some visitors from San Francisco. I stopped and talked to Maugeri and we walked together from the Casino to Maugeri's concession. I stood there a short while and then I left and called the Monte Carlo Inn again and got in touch with Agent Newman. I told him to pick me up along the road to Santa Cruz from the beach, and Newman, Smith, McGuire and Braly did. I then told them what had happened, and we decided to get in touch with Mr. Manning, so we drove to Los Gatos, got in touch with Mr. Manning, and made an appointment to meet at San Jose. When I finally got Agent Newman on the telephone it must have been around 12:30 or twenty-five minutes to one, and I think it took him maybe ten or fifteen minutes to meet me. If Mr. Newman testified in effect it was about 1:30, I wouldn't know. This is my version of [61] the thing, this is what I remember. There was no discussion between the agents about all the happenings on Saturday night and Sunday morning, and the fact of the agents not being around to see what was happening and to catch the people who were obviously committing a violation and for whom we were looking. Nobody was criticized and nobody criticized anyone else. Nobody was angry at anyone; just thought nothing of it, just one of those things. That is also true with Mr. Manning, my supervisor. He recommended me for a promotion, which I got, following the arrest in this case. There is in the narcotic division a promotion system based upon

(Testimony of Benedict Pocoroba.)

merits given to the agents. There is a specification on each case he succeeds in and his promotion and advancement depend upon that. The manner in which a case is investigated and the success of his work are considered. Although I was promoted following my work in this case I received no advance in pay, because I was already at the top of my class and could not be advanced in pay any more.

The Court: Well, Mr. Abrams, is it necessary to go into this?

Mr. Abrams: I am showing motive, your Honor.

The Court: You are covering the same ground over and over again.

Mr. Abrams: Q. Anyway, you were promoted?

A. That's right.

Q. Naturally, you are seeking promotion and advancement all the time in your work?

A. Why, surely.

Q. And you are anxious to make these cases for that promotion?

A. Well, not anxious to, but, naturally, if I get paid to do a certain type of work I want to do it right.

Q. Surely.

A. Because if I don't, naturally, I will be criticized or demoted, because there are such things as [62] demotions, too.

Q. Yes, but you are more apt to get a promotion and advancement and increase in pay in your work if successful than if it is unsuccessful?

A. That's right."

(Testimony of Benedict Pocoroba.)

The witness testified further: After meeting Mr. Manning in San Jose and discussing the situation with him we then went to Oakland, looking for Tocco, and anybody else that might be with him. I returned to Santa Cruz early on the morning of Monday, August 14th. I next saw Mr. Maugeri a couple of days later, on August 16th, which was the day that Tocco was arrested in the East. Following Tocco's arrest in the East Maugeri was arrested here in Santa Cruz. I did not participate in the arrest. but I did see Maugeri a short time before his arrest on the Boardwalk, and I had a conversation with him at that time.

"Q. And did you ask Mr. Maugeri to procure some narcotics for you? A. I did.

Q. How much did you ask him to procure for you?

A. I told him I was going home and I would like to take about ten cans with me.

Q. About ten cans? A. Yes.

Q. And did he get them for you?

A. He said——

Q. I asked you a question. A. He said——

Q. I didn't ask you what was said. Did he get them for you? A. No, he didn't.

Q. He did not get them for you? A. No.

Q. Did he ever get you any narcotics?

A. No, he never did.

Q. Did he ever hand you any narcotics?

A. No, he never did.

(Testimony of Benedict Pocoroba.)

Q. Did he ever take any money from you for narcotics? A. No, sir.

Q. Did Mr. Maugeri—did you ever see Mr. Maugeri give anyone any money for narcotics?

A. No. [63]

Q. Did you ever see Mr. Maugeri give anyone any narcotics? A. Outside of the boxes.

Q. Outside of bringing in these two boxes at your house that night? A. That is right.

Q. Did you ever see Mr. Maugeri ever take any money from anyone, or give any money to anyone for narcotics? A. No, sir.

Q. You had no arrangements with Mr. Maugeri, yourself, for buying narcotics, did you?

A. No.

Q. The only discussions you had ever had with Mr. Maugeri about narcotics was what you talked about today, and yesterday, on direct and cross-examination, here, about conversations that you and Mr. Maugeri engaged in pertaining to narcotics?

A. That is right.

Q. Is that right?

A. Yes; outside of the last conversation on the 16th.

Q. That we are just talking about now?

A. That is right."

Redirect Examination

The conversation that I had with Maugeri on August 16th in which I asked him to get some opium took place at his concession on the Boardwalk at Santa Cruz, California, at around four o'clock. No

(Testimony of Benedict Pocoroba.)

one was present outside of Mr. Maugeri. I told him I was going home and I would like to take ten cans of opium with me, and Maugeri said, "It is not my policy to do that kind of a business, but I will do it for you, but it will take about a week before I can get it." I saw Maugeri on Sunday, August 13, 1944, coming from his house at about 11:30 in the morning. The conversation that I had with Joe Barri in which he mentioned about coming to Santa Cruz to get opium, took place on the night he came to my cottage, August 10, 1944.

"Q. And what was the conversation with Barri on that [64] subject?

Mr. Abrams: Well, just a moment——

Mr. Hennessy: You brought it out on cross-examination.

Mr. Abrams: I don't think I did; he may have volunteered it, whatever conversation he may have had with Barri. It was not in the presence of Maugeri, and certainly wouldn't be binding on Mr. Maugeri.

Mr. Hennessy: You brought it out on cross—that is why I asked for the conversation.

Mr. Abrams: This man wouldn't be bound by——

The Court: If my recollection is correct, you did ask him some questions about some conversation that he had, and counsel is entitled to go into it. The objection is overruled.

Mr. Hennessy: He brought out——

The Court: The objection is overruled.

(Testimony of Benedict Pocoroba.)

Mr. Abrams: May I have an exception, please?

The Court: Yes.

Mr. Hennessy: May the reporter read the question, your Honor?

The Court: Yes.

(Question read.)

The Witness: A. It was on the night of the 10th of August, 1944 when I went to my cottage and found Joe Barri there. He told me that he had given Sam Maugeri $22,000 in $1000 and $500 bills for the purchase of 105 cans of opium, and that he had been followed by detectives in San Francisco, and had no intention of doing any business.

Q. That was on the evening of August 10th?

A. Yes, sir.

Q. Thursday night? A. Yes, sir.

Q. You stated on your cross-examination that it was August [65] 9th, which was Wednesday, that Barri had come to your cabin; that was an error, was it, it was August 10th?

A. It was August 10th, yes.

Q. Thursday?

A. Thursday, August 10th, yes.

Q. What conversation did you have with Barri about telephoning to San Francisco in order to locate Tocco?

A. As I stated, Barri told me to go to Sam Maugeri——

Mr. Abrams: Well, now, this is some more——

Mr. Hennessy: You brought it out on cross-examination.

Mr. Abrams: I am objecting to it, to any con-

(Testimony of Benedict Pocoroba.)

versation with Barri, not in the presence of the defendant.

The Court: I will overrule the objection on the grounds that part of the conversation was brought out in cross-examination.

Mr. Abrams: May I have an exception, please?

The Court: Yes.

Mr. Hennessy: Q. What conversation did you have with Barri about telephoning to San Francisco to locate Tocco?

A. Barri told me to go to Sam Maugeri's concession and tell him to call somebody in San Francisco and see that Tocco got safely in Santa Cruz and to my place.

Q. When was that?

A. That was the same night, the night of the 10th.

Q. The night of the 10th?

A. That is right.

Q. Did you go to Maugeri's place?

A. I did.

Q. And what conversation did you have with Maugeri? The same night, was it?

A. Yes, the same night.

Q. What conversation did you have?

A. I told Maugeri what Joe Barri had told me, and Maugeri gave me a number, which was the number of a saloon at 1371 Grant Avenue.

Q. Do you know who conducted that saloon?

A. An Italian [66] fellow by the name of Pete Scambellone.

(Testimony of Benedict Pocoroba.)

Q. Did you telephone to San Francisco?

A. I did.

Q. Did you locate Tocco?

A. No, I didn't, sir, but I left a message at the saloon to tell Tocco to come to my place as soon as he got back.

Q. And that was on Thursday evening?

A. That was Thursday evening, August 10th.

Q. And Tocco returned on the following evening, Friday evening? A. That is right.

Q. And he went to your cabin?

A. That is right."

The witness testified further: Maugeri was not present when Tocco and Barri packed the tins of opium in brown paper and taped them with the gummed paper tape and put them in the suitcase. Tocco and Barri obtained the cans of opium that they put in the suitcases from the two boxes that Sam Maugeri delivered there, which are now marked Government's Exhibits Nos. 3 and 4 in evidence, respectively.

As a rule Maugeri drove an Oldsmobile sedan although occasionally he drove a Chevrolet coupe which belonged to his nephew, Dominic, whose last name I don't remember, and who also lived at the home of Maugeri. My purpose in speaking to Major Manning of the proposal that my son, who was an aviator in the United States Air Force, secure permission to fly to Mexico and bring some opium back was to get the source of supply. I was endeavor-

(Testimony of Benedict Pocoroba.)

ing to learn where this opium was coming from, and wanted to get at the source of supply in Mexico.

On the evening of August 12th, when Maugeri was leaving the cabin, after having deposited the two cardboard boxes there, and after having had a drink, he told Tocco that he would return at about five o'clock in the morning. The following morning at about three-thirty I heard a knock on the door and Tocco [67] opened the door. I was in bed. The door from the street led directly into the room in which I was sleeping. When Tocco opened the door I heard a man say, "Get the grips and let's go." It sounded like Maugeri's voice. I recognized it as Maugeri's voice. I have been in the Federal Narcotic Service 16 years and have been engaged principally in under-cover work. Although I have been continuously in the service of the Government during those sixteen years I have been borrowed on several occasions. On one occasion the Crime Commission in Chicago, through the United States Attorney, and Mr. Frank Lersh, who was the president of the organization, obtained my services. When I was working for them I had to take leave without pay from the Bureau of Narcotics, but I still remained on the rolls. At the end of the assignment I went back to my job. My connection with the Crime Commission in Chicago was for about a year. On another occasion I conducted an investigation for the Attorney General of New Jersey in connection with murder. On that occasion I did not take a leave, the Bureau paid my salary and the Attorney

(Testimony of Benedict Pocoroba.)

General of New Jersey paid the expenses. I also worked for the National Board of Fire Underwriters for about sixteen months, at which time I took a leave of absence from the Narcotics Bureau.

Recross-Examination

During all these years I have acted as an under-cover agent most of the time. In the present case my work was to act in this under-cover nature and to conceal my real identity. The conversation that I had with Mr. Maugeri was that I asked him to get me ten cans of opium and to which he replied that it was not his policy to deal in small amounts, but that he would do it for me for a price of $225 a can, and that he would do it in about a week. This was not reported to Agent McGuire or Agent Newman, because I had no chance to tell [68] them of the conversation. Maugeri stated he would do it in about a week, but the orders were to arrest him after Tocco had been arrested. I talked about it with Mr. Manning, who was on the scene at the time of the arrest, and he said that he couldn't wait a week, that Maugeri had to be arrested right away. I had no discussion with Mr. Manning about advancing the $2250 in marked money for the 10 cans of opium so that Maugeri would at least be caught for accepting the money, because I never give money in advance to anybody. Whenever I buy dope I want the money on the line. What the other agents do when dealing with informers is their business, but I never personally give money in advance. In

(Testimony of Benedict Pocoroba.)

this case I made no effort to give Mr. Maugeri the money in order to get the narcotics that I asked for. When Tocco came back from San Francisco just before that Saturday and came to my place, he brought back the three grips. Concerning my son and the Army Intelligence, I thought the stuff might be coming in from Mexico, and that it would be a good way to get to the source of supply. It was Maugeri's suggestion about my son, it was absolutely his idea, but it was my idea to get at the source of supply in Mexico.

"Q. Now, you said Mr. Maugeri left Saturday night and said, 'I will be back at 5:00.'

A. That is right.

Q. Not 5:00 in the morning; he said he would be back at 5:00? A. 5:00, yes.

Q. Well, Mr. Hennessy, in giving you a leading question a little while ago, said, 'I will be back at 5:00 in the morning.' You mean 5:00, not 5:00 in the morning? A. 5:00, that is right.

Q. That is what he said, 5:00? A. Yes.

Q. As a matter of fact, the knock came on the door at 3:30 in the morning?

A. That is right. [69]

Q. And you did not see the person who knocked, but you just heard a voice? A. That is right.

Q. Which you think might have been Maugeri's voice? A. That is right.

Q. Right. A. That is right."

(Testimony of Benedict Pocoroba.)

Further Redirect Examination

The witness testified further: There wasn't any doubt in my mind that it was Maugeri's voice. The passageway leading from Beach Street to my cabin at the Miller Apartments is not wide enough to permit an automobile to be driven in there from Beach Street to the front of my apartment.

Further Recross Examination

The witness testified further: The letter you show me dated June 12, 1944, written in Italian, addressed to me at Santa Cruz, and showing a return address of B. Scardina, 1540 Grand Avenue, Chicago, Illinois, bearing a postmark of June 12, 1944, with airmail stamps, is a letter that I wrote and sent to my wife with instructions that she put it in the mail box in Chicago, which she did. The letter which you show me written in English is a correct translation of the letter written in Italian. The name B. Scardina is an assumed name, and the letter was intended as a decoy letter.

(The letter written in Italian and the English translation were then received in evidence and marked Defendant's Exhibit B in evidence.)

The witness testified further: The letter which you show me, dated June 27, 1944, written in Italian, and addressed to me, like the other letter is addressed, also bearing the same return address as the other letter, and bearing a postmark in Chicago, Illinois, June 28, 1944, is likewise a letter which I wrote in Italian and sent to the District Supervisor

(Testimony of Benedict Pocoroba.)

of Narcot- [70] ics at Chicago, Illinois, asking him to drop it in the mail, which was done. Both these letters were written by me, sent East and were returned to me in the mail, according to this plan of mine. The translation in English of the second letter is a correct translation.

(The letter and the translation were received in evidence and marked Defendant's Exhibit C in evidence.)

The witness testified further: The mention of "paste" in the letter means opium. I wrote that letter, myself. Nobody assisted me and nobody saw the letter, except myself, or knew of its contents. The same applies to the second letter.

TESTIMONY OF PETER SCAMBELLONE

For the United States.

Peter Scambellone, produced as a witness on behalf of the United States, having been first duly sworn, testified substantially as follows:

My name is Peter Scambellone. I live alone in a flat at 1644 Grant Avenue, San Francisco. There are five rooms in the flat. My business address is 1371 Grant Avenue. I am in the saloon business. I know Salvatore, or Sam Maugeri. I have known him for about thirty years and have been friendly during that time. I remember an occasion on or

(Testimony of Peter Scambellone.)

about Wednesday, August 9, 1944, when Salvatore Maugeri called at my saloon. Later, Joe Tocco and Joe Barri were present in the saloon with him. I think it was August 9th. I am not sure, though, of the date. I don't know what time Maugeri came to my saloon; about three or four o'clock. I can't tell you sure. When he came in the saloon I saw him alone.

"Q. Do you know a man named Joe Barri?

A. Joe Barri? No. [71]

Q. Did you ever see a man named Joe Barri in your saloon? A. No.

Q. What about a man named Joe Dentico?

A. I see a lot of people. I don't ask nobody's name.

Q. Do you know a man named Joe Tocco?

A. Joe Tocco? Maybe I see one; I don't know sure.

Q. Did you have a conversation on that day when Salvatore Maugeri called at your saloon about suitcases? A. Yes, sir.

Q. Who were present at that conversation?

A. A lot of people was outside.

Q. Who?

A. I was outside—there were three or four outside on the sidewalk.

Q. Do you know who they were? A. No.

Q. Was Maugeri there?

A. Yes, he was there."

The witness testified further: I see Maugeri in the courtroom. He is over there. Sam Maugeri told

(Testimony of Peter Scambellone.)

me he had a friend who had two suitcases and asked if I would let him keep them in the house until the fellow found a room. I told him, "Yes, here is the key." I gave him the key. The fellow with the taxicab was there and took the two suitcases over to my house. I did not see the suitcases there. When I went to my house later I was pretty sick and I never looked for anything. Joe Tocco did not telephone to my house that day. I have no telephone at home. He did not visit there. There were two bags. I did not see anything like U. S. Exhibit 2 For Identification, which you are showing me. There was a big bag like U. S. Exhibit 1 For Identification, which you are showing me. I don't know about the color. It was a big bag like that. The suitcase and the bag remained in my house a couple of days, I think. I don't remember when they were taken away. I did give Maugeri the key to my house, but Maugeri did not visit my house that day. I [72] received the keys back from the same fellow that took the suitcases, the taxi driver, about five minutes after.

Cross-Examination

Mr. Maugeri asked me if they could leave the suitcase in my place until these men found a room, which they were looking for. That is all that was said.

TESTIMONY OF JOHN SACCOCCI

For the United States.

John Saccocci, produced as a witness on behalf of the United States, having been first duly sworn, testified substantially as follows:

My name is John Saccocci. I live at 3248 Folsom Street. I am in the taxi business, and am affiliated with the A-1 Sedan Service, whose headquarters are at 801 Ellis Street. I have known the defendant, Salvatore Maugeri, for about 16 or 18 years. I see him here in the courtroom. I saw Maugeri about the saloon of Peter Scambellone on an occasion when he asked me to bring some suitcases to Mr. Scambellone's house. I do not remember the date that I saw him there. The suitcases were in Mr. Maugeri's Oldsmobile sedan, from where I removed them in order to take them to Mr. Scambellone's house. I took them out of the rear seat of Maugeri's car. They were light. They did not appear to have anything in them. Maugeri gave me the key to Scambellone's house and I left the bags in the hallway on the first floor. I could not identify U. S. Exhibit 1 For Identification, or U. S. Exhibit 2 For Identification as being the bags I delivered to Scambellone's house. I don't know a man by the name of Joe Tocco, nor a man by the name of Joe Barri. When Maugeri asked me to take the suitcases to Scambellone's house there were a few people about the bar but I didn't pay any attention to them. [73]

(Testimony of John Saccocci.)

Cross-Examination

When Maugeri asked me to take the suitcases to Scambellone's house I was on my way out from the lavatory. There were other people about the place, but I do not know whether Maugeri was with any of them. The suitcases appeared to be very light, empty, to me. I do not know whether there was anything in them, or not, and I did not open them.

TESTIMONY OF BURHL B. HARWOOD,

for the United States.

Burhl B. Harwood, produced as a witness on behalf of the United States, having been first duly sworn, testified substantially as follows:

My name is Burhl B. Harwood. I live in Santa Cruz, California. I am a clerk in the Bowman-Forgey Stationery Company Store at 146 Pacific Avenue, Santa Cruz. I was employed there on August 8, 1944, in that capacity. On that day I sold a considerable amount of brown wrapping paper and brown gummed paper tape to two gentlemen, one was a kind of heavy-set fellow, sandy complexioned, and the other fellow was a short, little chunky fellow and wore a mustache. They purchased four large sheets of brown wrapping paper and one large roll of brown gummed paper tape. Government's Exhibit No. 5 in evidence appears to be a portion of the brown wrapping paper that I sold to those two

(Testimony of Burhl B. Harwood.)

men on that day. Government's Exhibit No. 6 in evidence appears to be the brown gummed paper tape that I sold to those two men on that day. I would not swear it is the same roll, but I sold a roll just like this to them. I did not make more than one sale of that brown wrapping paper that day. Immediately after they left my store I was contacted by a Federal agent who did not give me his name. He questioned me about the sale of the brown wrapping paper and the brown gummed tape to the two men. He did not ask me if I sold them any [74] brown paper or gummed paper, he merely asked what I had sold, and I told him. This was immediately after the two men had left the store.

Cross-Examination

I do not know the names of the two men who made the purchase. I had never seen them before. I have seen them since then around Santa Cruz, and would know them if I saw either one again. They are not in the courtroom. I know Mr. Maugeri. He was not one of those two men.

TESTIMONY OF HENRY B. HAYES

for the United States.

Henry B. Hayes, produced as a witness on behalf of the United States, having been first duly sworn, testified substantially as follows:

My name is Henry B. Hayes. I live at 1080 Eddy

(Testimony of Henry B. Hayes.)

Street, San Francisco. I am a Federal Narcotics Agent and have been with the Bureau of Narcotics since 1936. On August 8, 1944, I was in Santa Cruz. On that day, at approximately 11:50 a. m., I followed Joseph Tocco and Joe Barri from 32 Main Street, the residence of Sam Maugeri, to Bowman-Forgey Stationery Store on Pacific Avenue. They were on foot, and I followed them on foot. They went into the store and talked to the clerk. I saw them looking at some paper, and I waited outside until they came out. When they came out I noticed that Barri had a package and Tocco had a package. Then I went in and identified myself to a Mr. Harwood, the clerk, and he told me they had purchased some heavy wrapping paper and a roll of gummed tape, and had looked at a postal scale, but decided it was too heavy for their use. When I came out after talking to Mr. Harwood I did not see them. Before that day I had been engaged in the surveillance of Salvatore Maugeri in Santa Cruz. I [75] went to Santa Cruz in this matter on March 2, 1944, and worked in company with Vance Newman and other Federal agents. At first we lived in a house at 29 Park Avenue, and then later moved to the Monte Carlo Inn, on Third Street, Santa Cruz. I remained in Santa Cruz continuously from March 2, 1944 until about August 13th, with the exception of intervals of three or four days at a time, when I came back to San Francisco on two or three occasions. I know Benedict Pocoroba. I met him

(Testimony of Henry B. Hayes.)

with Agent Newman at the bus station when he came to Santa Cruz. I saw him in the company of Salvatore Maugeri on many occasions, and I saw him enter the residence of Salvatore Maugeri. I saw him in the company of Salvatore Maugeri in or about Mr. Maugeri's concession on the Boardwalk, and I have seen them visiting theatres together and traveling in automobiles together. Mr. Maugeri drove an Oldsmobile, about a 1938 model. I have also seen him drive a Chevrolet coupe and a Pontiac automobile, which cars were kept in his garages.

I know a man named Joe Tocco. I first saw Tocco at 9:30 p.m. on July 9th talking to Sam Maugeri at his concession on the Boardwalk. I have also seen him in or about the residence of Salvatore Maugeri. Tocco was living at the residence of Maugeri, 32 Main Street. I have seen Tocco in the company of Benedict Pocoroga on more than one occasion. I have seen them on the beach together and I have seen them walking to Pocoroba's cabin, and I have seen them entering Maugeri's residence together. I know a man named Joe Barri. I first saw him during the afternoon of July 21st, when he was sitting on a bench in front of Maugeri's concession, talking to the defendant, Sam Maugeri. I have seen him subsequently in the company of Salvatore Maugeri. I have seen him go to picture shows with him, and I have seen them walking together. I have seen him entering and leaving the residence [76] of Salvatore Maugeri on more than one occasion.

(Testimony of Henry B. Hayes.)

On July 28th and 29th I saw Tocco and Barri at a place near Felton, a cabin. On August 3rd I rented a cabin near Felton and occupied it. It was right next to theirs. Mr. Gleason, Customs Patrol Inspector, occupied the cabin with me. At that time Tocco and Barri were occupying an adjoining cabin. The resort was known as the Bellevue Swiss Crott, just off Highway No. 9. I saw Maugeri visit them at Felton. I never saw Benedict Pocoroba visit them at Felton. They left the cottage on August 6th, which was a Sunday, in a Chevrolet coupe driven by Maugeri, the defendant, and they drove to Maugeri's house and unloaded the grips and took them into the house at Santa Cruz.

On August 9, 1944, Inspector Gleason and myself in an automobile followed Salvatore Maugeri, who was driving an Oldsmobile sedan, to San Francisco. Joe Barri and Joseph Tocco were in the car with Maugeri. We followed them all the way from Santa Cruz to San Francisco. When they arrived in San Francisco they first stopped on 24th street, right near Van Ness; that is 3212. Defendant Maugeri got out of the car and went to a building at 3212 and remained there for possibly twenty minutes, and came out and got back into the car, and then drove on into San Francisco, and stopped on Geary street between Powell and Stockton. Tocco got out of the car at that point. Inspector Gleason got out of our car also. Then I followed the defendant Maugeri. He drove away after Tocco got out. Barri was still in Maugeri's car. They drove to a point on

(Testimony of Henry B. Hayes.)

Grant Avenue, near a saloon located at 1371 Grant Avenue. It was Scambellone's saloon. Maugeri parked the car and they both got out and went into this saloon. I later saw Tocco in the vicinity of that saloon, around noon or afternoon. While Maugeri's Oldsmobile sedan was parked near the saloon on Grant Avenue I walked past the car and looked into [77] the interior of the car. I observed a tan suitcase and a handbag on the floor in the back seat. The tan suitcase was of the same appearance as Government's Exhibit No. 1 For Identification. It was a bag of about the same size and the same color. It was a black handbag that I had seen Barri with before that was in the car with the tan bag. I wouldn't say that Government's Exhibit 2 For Identification is the bag. It was a grip, like, that opens at the top; it was brown or black in color. At about 3:35 I saw the defendant Maugeri talking to a taxi driver in front of the saloon and the taxi driver drove alongside of Maugeri's car and unlocked the car and took the two suitcases out of the car and put them into the taxicab, and drove on Grant Avenue to 1644 Grant Avenue, and pulled into a driveway there and parked the car and got out with the two handbags and went up the steps and opened the door and set them inside the house, and then he drove back to the saloon, and Maugeri was still standing there. Prior to that time, about 1:30 or 1:45, Maugeri had gotten into the Oldsmobile and drove out Pacific Avenue to Van Ness, turned into Franklin, then

(Testimony of Henry B. Hayes.)

drove back to Bay Street, and back to the saloon, and parked the car at approximately the same spot it was parked in before leaving. I didn't see Maugeri go into the flat, or apartment, where the suitcases had been left by the taxi driver, but I saw him earlier that day walking from the direction of the apartment back toward the saloon, a distance of two and one-half or three blocks. That was the apartment that was occupied by Peter Scambellone.

On that evening at about 5:30 p.m. when Maugeri left the saloon, Agent Grady and I followed him. He left in his Oldsmobile car, he was alone, and we followed him to the Bayshore Highway. He was going south on the Bayshore Highway towards Santa Cruz. That was around six o'clock when I last saw him on the evening of August 9th. On that same evening I saw Joe Tocco [78] and Joe Barri at the saloon at 1371 Grant Avenue, and later that evening I saw Tocco at the Telenews Theatre, and still later at the Whitcomb Hotel on Market Street. Barri was with him at the Whitcomb Hotel. It was about midnight, around midnight. On the following day, Thursday, August 10, I saw Joe Tocco leave the hotel between eight and nine o'clock that morning, and take a street car, and get off at Market and Ellis. He went into the Mayflower Coffee Shop, and then later went into a bar on Stockton Street, and came out in a few minutes and got on a Stockton street car and rode to North Beach. He left the car and walked to the saloon at 1371 Grant Avenue. On that day I did not see him enter the home of Scambellone.

(Testimony of Henry B. Hayes.)

I saw Joe Barri on Thursday, August 10th. At about twelve o'clock or a little after Tocco and Barri came out of the Whitcomb Hotel and walked down to the Greyhound bus station at Fifth and Mission. Then they walked around town, and later took a street car to North Beach. Tocco walked up to 1371 Grant Avenue and Barri stood on the corner at Columbus Avenue and looked at Tocco as he was walking up Grant Avenue to 1371, which is the saloon. Barri did not accompany him to the saloon. Barri turned around and walked rapidly up Broadway, and went into a theatre and remained there for about ten minutes. He came out without any hat. He was watching behind him and looking up and down the street. Finally, he caught a street car. Agent Gleason and I followed the car in a taxicab. When Barri went into the theatre I was following him on foot. The theatre is, I think, on the west side of Broadway. Barri appeared to have observed someone. He then got on a street car and I didn't follow him any more. I saw him later that evening at the bus station at Fifth and Mission. He boarded a bus around 5:20. I believe it was the bus that left for Santa Cruz. Tocco was not with him. I did not see Tocco [79] any more that evening. I was taken ill with the 'flu and I did not participate in the investigation after the 10th. I did not return to Santa Cruz again.

Cross-Examination

I have been in the Bureau of Narcotics since 1936, and have had a good deal of experience with these

(Testimony of Henry B. Hayes.)

narcotic cases, and in the making of a lot of these narcotic cases, and I have dealt with what is called an informer, a person who cooperates with an agent, and assists in obtaining evidence on a person who is suspected of trafficking in narcotics and who will arrange very often to make a purchase of narcotics from one suspected of selling, and which transaction is normally witnessed or watched or observed by me and other agents. An informer usually is a person of an underworld character.

"Q. As a rule, an informer may change his name and attempts to purchase the narcotics from somebody suspected of selling, and in that way the person is caught and arrested and prosecuted?

"Mr. Hennessy: I object to that on the ground it is incompetent, irrelevant, and immaterial.

"The Court: I will sustain the objection.

"Mr. Abrams: I will ask the one question now.

"Q. You very often in your business—I think Mr. Hennessy knows what I am leading up to; maybe that is what he is objecting to, but I don't think he will object to this—very often, Mr. Hayes, the money is given over by the agent or the informer, by the informer, rather, to the person whom you want to obtain the narcotics from before you get the narcotics; isn't that true?

"Mr. Hennessy: I object to that as incompetent, irrelevant and immaterial. [80]

"The Court: I will sustain the objection."

The witness testified further: I was in Santa Cruz on August 8th. I had been in Santa Cruz

(Testimony of Henry B. Hayes.)

from March 2nd, except at intervals of a few days at a time on one or two occasions. Mr. Pocoroba had gotten to Santa Cruz, as I recall, about May 1st. The other agents were in Santa Cruz for several months prior to Mr. Pocoroba's arrival. As I recall, we were down there about the 1st of March. While in Santa Cruz I saw a man by the name of Lagaipa. Prior to the time I got there he had a bar or a restaurant in Santa Cruz. His family was there, too. I don't know if his family is still there During the investigation his family was living at 113 Buena Vista Avenue, Santa Cruz. He had his wife and two daughters and one boy.

On August 8th I followed Mr. Tocco and Mr. Barri to this stationery store. They left the Maugeri house at 32 Main Street at approximately 11:50 in the morning. I saw them coming out of Mr. Maugeri's house. They went to the stationery store on Pacific Avenue, Santa Cruz. I saw them looking at the packages in the store, and when they came out later they had a package. After they left the store I went in and talked with the clerk, Mr. Harwood, and I was in there for about three or four minutes, four or five, possibly, and when I came out I didn't see them. At that time I was alone there. There were no other agents with me. As far as I know, none of the agents followed Tocco and Barri when they left the stationery store to see where they went. As far as I know, and as far as the other agents know to my knowledge, we don't know where Tocco and Barri went to after they

(Testimony of Henry B. Hayes.)

left the stationery store, or where they took those packages to. I didn't see them go back to Mr. Maugeri's house. When I and the other agents arrived in Santa Cruz we first lived at 29 Park Avenue, and then moved over to the Monte Carlo Inn, which [81] is less than a block from Mr. Maugeri's house. Mr. Maugeri's house is about seven or eight blocks from the Miller Apartments, where Mr. Pocoroba was living. During the time that myself and the other agents were in Santa Cruz during the months from March to August of 1944 all of our time was devoted to this particular case. We were giving our unlimited time and attention and energy to this case at any hour of the day or night. Hours meant nothing. We had no phone at 29 Park Avenue. There was a phone in the lobby of the Monte Carlo Inn. Agent Newman and Inspector Braly were at the Monte Carlo Inn sometime before I went to the Monte Carlo Inn. I do not recall the time I went there, but I think I went there sometime in the latter part of June, and remained there until August. During the time I was there with the other agents we would meet Mr. Pocoroba every two or three days by appointment made by telephone. We would meet him and he would let us know what was going on, as far as he knew. While in Santa Cruz with the other agents an important part of our duty was to keep Tocco and Pocoroba and Barri and Lagaipa and Mr. Maugeri under surveillance. We followed them and observed them as much as we could. Following out

(Testimony of Henry B. Hayes.)

that plan, and while carrying out our duties we followed Mr. Tocco and Mr. Barri and Mr. Maugeri in Mr. Maugeri's car to San Francisco on August 9th. We left Santa Cruz about nine o'clock in the morning of that day, and on arriving in San Francisco the first stop that was made by Mr. Maugeri's car was some place on 24th Street, near Van Ness South, where he stopped at a sort of warehouse, an olive oil place. Maugeri went in alone, and the other two men stayed in the car. Maugeri came out in about twenty minutes and drove to Geary and Powell Streets. Tocco got out of the car there and went some place. I do not know where he went. Inspectors Gleason and Braly followed him. Maugeri then left without Tocco and [82] drove to North Beach and parked his car on Grant Avenue just across Green Street. Maugeri got out of the car and Barri got out, too. They both went into this bar. I did not see Barri come out again. I was not there all the time. I went to lunch and made two or three phone calls during the day from there. About an hour or so after they had parked the car I walked by the car and looked in. It was a sedan. I could easily see the suitcases by looking through the window. They were in the back seat, on the floor. That sedan has a trunk for luggage, a closed compartment. Maugeri drove out to the vicinity of Pacific and Van Ness Avenue at around 1:30 or 1:45. He did not stop there. He drove out Pacific Street to Van Ness Avenue at about 1:45 or

(Testimony of Henry B. Hayes.)

so. During that day I did not see him drive to Pacific and Sansome. I was not watching him all the time. I had lunch, and then I had two or three phone calls. He could have driven down around Pacific and Sansome Streets during that day without being followed by me, or being noticed by me. At about 5:30 in the afternoon he left the saloon on Grant Avenue and drove out Van Ness to Army, and over Army to Bayshore. He didn't make any stops there. During the day I did not see him drive out to Army Street and stop. I was not watching him all the time. There were several agents there; we split up. I did not see him go into a restaurant to eat, but I did see him leaving San Francisco for Santa Cruz alone between five and six o'clock that night. I saw Barri take the bus back to Santa Cruz the next day, August 10th.

Redirect Examination

When I saw Mr. Tocco and Mr. Barri leaving the cabin at the resort near Felton I saw them load their baggage into the automobile. Tocco had a tan bag that resembled Government's Exhibit 1 for Identification, and a blue bag that resembled [83] Government's Exhibit 2 for Identification. Barri had a bag about the size of Government's Exhibit 2 for Identification, but it was a black bag and appeared to be leather.

TESTIMONY OF JESS BRALY

For the United States.

Jess Braly, produced as a witness on behalf of the United States, having been first duly sworn, testified substantially as follows:

My name is Jess Braly. I reside in Yuma, Arizona. I am a Customs patrol inspector, and have been so for about fourteen months. I was assigned to conduct a surveillance of certain persons in the Santa Cruz area in May of this year. I arrived in Santa Cruz on May 5, 1944, and lived the big part of the time at the Monte Carlo Inn. I know the defendant Salvatore Maugeri, and saw him for the first time about May 6th of this year at Santa Cruz, on the Boardwalk, at his concession. I know Benedict Pocoroba. I saw him in Santa Cruz. I saw him in company with Salvatore Maugeri on numerous occasions on the Boardwalk, in and out of Mr. Maugeri's house, in the car with him, and going to the show. I know Joe Tocco. I saw him for the first time about July 9th. I saw him coming out of Mr. Maugeri's house. I saw Joe Tocco in the company of Maugeri frequently thereafter, going in and out of the house, and at his place of business on the Boardwalk. I saw Tocco and Maugeri in the company of Pocoroba around the concession several times. I know a man named Joe Barri. I first saw him on July 21st at Santa Cruz. He was on the Boardwalk with Joe Tocco. I have seen him in the company of Salvatore Maugeri around the Boardwalk and in and out of Mr. Mau-

(Testimony of Jess Braly.)

geri's house; I have seen them in the car of Mr. Maugeri frequently. I saw Tocco and Barri up at Felton. I was not there [84] the day they moved out and returned to Santa Cruz, but I have seen Mr. Maugeri there on one occasion at the cabin of Tocco and Barri while they were also present. I followed Maugeri when he came to San Francisco on August 9th. I was with Agent Vance Newman, the Federal narcotic agent, in an automobile. Maugeri was driving a gray Oldsmobile and Joe Barri was in the front seat with him, and Joe Tocco was in the back seat. We followed them to San Francisco. They stopped their car at 3212 Twenty-fourth Street. Mr. Maugeri got out of the car, went in the building there for about thirty minutes, then they came in to San Francisco to the intersection of Geary and Powell Streets. Joe Tocco got out of the car, and I also got out and followed him from there on. He went into the Santa Fe ticket office and remained in there for about twenty-five minutes. After he left there he went up Stockton Street and stopped in a cafe, got himself some lunch, and then got on a street car and went to within a block of 1371 Grant Avenue. He got off the street car and walked to that address. That is Scambellone's saloon. I saw Maugeri and Barri in or about the saloon while Tocco was there. I saw Maugeri's gray Oldsmobile sedan parked across the street from the saloon. I looked into the sedan while they were in the saloon and observed a large brown suitcase

(Testimony of Jess Braly.)

in the car that looked like Government's Exhibit 1 For Identification. I did not see any other luggage. The large tan or brown suitcase was sitting in the back of the car, in front of the back seat. About three o'clock in the afternoon I observed a taxicab come up and stop by the side of Maugeri's car, and the driver of this taxicab removed some luggage into the taxi. I could see the tan suitcase. I couldn't identify it. I could see he was removing some kind of luggage, but I couldn't say just what it was. He went up the street in the direction of [85] 1644 Grant Avenue. I tried to follow him, but we lost him. By the time we turned around we didn't see where he went. I was with Agent Newman. I did not see Maugeri at that time, nor did I see Barri or Tocco at that time. On the following day, August 10th, I saw Joe Tocco in the vicinity of the saloon. I was with Agent Newman. I did not follow him. I did not see Barri. On the following day, Friday, the 11th of August, I did not see Tocco. I returned to Santa Cruz a little after noon on Friday, August 11. I was in Santa Cruz all day Saturday and Sunday. I saw Tocco and Barri on Saturday, August 12th, on the Boardwalk, in Santa Cruz, about eleven o'clock in the morning. I saw Maugeri on Saturday at his concession in the morning, and I saw him that evening again, late in the evening of Saturday, August 12, 1944. The last time in the evening that I saw him at his concession was about ten p.m. The following day I went to the Oakland Mole and assisted the other agents in cov-

(Testimony of Jess Braly.)

ering some transcontinental trains. I returned to Santa Cruz early on the morning of August 14th. I arrived there at about 1:30 a.m. on Monday morning, August 14th, and went directly to Agent Pocoroba's cabin at the Miller Apartments. Agent Newman, Narcotic Agents McGuire and Pocoroba, and Customs Agent Earl Smith were with me. We went there to Pocoroba's cabin to get some boxes that were in Pocoroba's cabin, and some wrapping paper, some scraps of paper. We got them. Government's Exhibits 3 and 4 in evidence are the boxes that we got in Pocoroba's cabin about one o'clock in the morning of Monday, August 14th, 1944. They were taken and locked in the compartment of Agent McGuire's car. Government's Exhibit No. 5 in evidence is the wrapping paper that we found in Pocoroba's cabin on that morning. It was taken and placed with the boxes in the car of Agent McGuire. Government's Exhibit No. 6 in evidence is the [86] brown paper tape that we found in Pocoroba's cabin, and it was delivered to Agent McGuire. I then returned to San Francisco on Monday, August 14th, and that night I left for Chicago by plane. I was covering a different station than Agent Newman and did not participate in the arrest of Joe Tocco.

Cross-Examination

I came here from Arizona just to work on this case. I arrived in Santa Cruz about May 5th and remained in Santa Cruz with the other agents until

(Testimony of Jess Braly.)

I left Santa Cruz on August 14th for San Francisco and Chicago, with the exception of the time that I was in San Francisco around August 9th for a couple of days. Outside of that I was in Santa Cruz, except that on June 5th I was called to Los Angeles to attend Federal court, and I came back June 10th. During all this time the other agents and myself were detailed to watch the movements of Mr. Pocoroba, Mr. Lagaipa, Mr. Tocco, Mr. Barri, and Mr. Maugeri, and anyone else they might contact or be associated with. We agents were in constant touch with Mr. Pocoroba, either in person or by telephone, to have him report as to what was going on, and what would be coming along.

On Saturday, August 12th, and Sunday, August 13th, I was in Santa Cruz. Earl Smith, Customs Agent, and Narcotics Agent McGuire, and Agent Newman were also there. There were five of us with Pocoroba. We were staying at the Monte Carlo Inn. During Saturday, August 12th, and on that night, and during the day and night of Sunday, August 13th, we agents were actively engaged in this work in Santa Cruz, both day and night. During those two days, Saturday and Sunday, I saw Tocco and Maugeri on the Boardwalk. I did not see Barri. I don't remember seeing Pocoroba. I had Mr. Maugeri under surveillance on those two days. I would not say we were watching Mr. Pocoroba's cottage in the Miller Court continuously, but we had Mr. Pocoroba's place [87] under surveillance

(Testimony of Jess Braly.)

during these weeks down there in Santa Cruz, as well as Mr. Maugeri's house. In fact, any place that might have been visited and frequented by these men, or where they might have lived. Between the hours of six p.m. and twelve midnight on Saturday, August 12th, I and the other agents were around the Boardwalk I imagine, part of the time. I couldn't say just exactly where we were, but approximately in the vicinity of the Boardwalk. We were around on the beach probably. We were in Santa Cruz. We have been around the Boardwalk. We may have been around Maugeri's house. We went by there several times.

"Q. You might have been around Pocoroba's cabin? A. No.

Q. Any particular reason why you weren't there? A. Yes.

Q. There was some reason why you didn't go around Pocoroba's cabin?

A. There is a reason, yes.

Q. On this particular night? A. Yes, sir.

Q. You were there on the other nights, weren't you? A. Yes, that is correct.

Q. On this particular night, August 12, neither you or the other agents were in the vicinity of Pocoroba's cabin?

A. We might have been around there a time or two, but we didn't stay around there.

Q. You didn't stay around or keep it under surveillance? A. No, sir.

(Testimony of Jess Braly.)

Q. Neither the following Sunday morning?

A. No, sir.

Q. In the early hours of Sunday morning?

A. No, sir.

Q. Where were you and the other agents from twelve o'clock midnight of Saturday, August 12, to noon or one o'clock of August 13, the afternoon of August 13, Sunday?

A. Well, I imagine from midnight to about seven in the morn- [88] ing we were in bed.

Q. From midnight to when?

A. To seven o'clock the next morning.

Q. You think you were in bed sleeping?

A. At the Monte Carlo Inn.

Q. And then where did you go after seven o'clock?

A. Well, we probably had breakfast.

Q. Don't you know? Don't you remember?

A. Yes, I remember we had breakfast. Yes, we went to breakfast, and then we went to the Boardwalk.

Q. That early in the morning?

A. After we had breakfast.

Q. Did you stay on the Boardwalk? How long did you stay on the Boardwalk?

A. Not very long.

Q. Where else were you up to noon time?

A. Uptown for a short while and back to the beach, to the Boardwalk.

Q. Around Maugeri's house?

(Testimony of Jess Braly.)

A. We went by Maugeri's house several times.

Q. Around the Miller cabins?

A. Passed by.

Q. Around Mr. Pocoroba's cabin?

A. Passed by there.

Q. Do you know when?

A. That morning I would say we passed by there a time or two.

Q. Around noon time?

A. Shortly before noon.

Mr. Abrams: That is all.

Redirect Examination

Mr. Hennessy: Q. You said you had a reason for not going near Pocoroba's cabin on Saturday, August 12, 1944. A. Yes, sir.

Q. What was the reason?

Mr. Abrams: I object to that as being incompetent, irrelevant, and immaterial; I didn't ask for the reason.

Mr. Hennessy: I think I have a right to show why he didn't. [89]

Mr. Abrams: His opinion would be a matter of opinion and conclusion.

The Court: Oh, I think in the interest of justice, having opened up the subject and leaving it in midair, the facts should be brought out. I will overrule the objection.

Mr. Abrams: Exception, your Honor.

The Court: All right, exception noted.

Mr. Hennessy: Q. What was the reason?

(Testimony of Jess Braly.)

A. Agent Pocoroba had advised us that Barri and Tocco were staying at his cabin and that Joe Barri was very frightened, he was afraid the law was following him, so for that reason we kind of gave his cabin a wide berth.

Mr. Hennessy: That is all.

Recross Examination

Mr. Abrams: Q. Pocoroba told you that?

A. Yes.

Q. What? A. Yes, he did.

Q. That Barri was frightened and that is the reason why you stayed away from that cabin?

A. That is right.

Q. Pocoroba's cabin? A. Yes, sir.

Q. You knew that Pocoroba and Tocco were staying there, didn't you; you knew that Tocco and Barri were staying at Pocoroba's cabin during that time, didn't you? A. Yes, sir.

Q. And you particularly had Tocco and Barri under surveillance all the time, isn't that right?

A. That is right.

Q. And you also were advised, were you not, that there was a transaction pending involving narcotics? A. That is right.

Q. And narcotics—you believed narcotics—withdraw the question. Narcotics which would involve Mr. Tocco and Mr. Barri, isn't that true?

A. Yes, sir.

Q. You knew that Mr. Tocco and Mr. Barri were contemplating going to New York, or one of them, anyway, going east about that [90] time?

(Testimony of Jess Braly.)

A. We thought they were.

Q. As a matter of fact, one of them went into the Santa Fe depot in San Francisco on the 9th, isn't that true? A. That is right.

Q. And yet you didn't think it necessary, and the other agents didn't think it necessary and important to keep Mr. Pocoroba's cabin in the Miller Apartments under surveillance every moment of the day and night of August 12th and 13th?

A. No, we didn't.

Q. Well, how did you expect to catch them, or anybody, any narcotics transaction, unless you kept them under surveillance and the place, every minute of the day and night? A. They were caught.

Q. What? A. They were caught.

Q. Was Barri caught?

A. Tocco was caught.

Q. Tocco was caught; where, in the East?

A. That is right.

Q. Getting off the train in Chicago; isn't that right? A. Yes, sir.

Q. Barri wasn't caught, was he? You are still looking for Barri, aren't you, that is true, isn't it?

A. That is true.

Q. And by not keeping Mr. Pocoroba's cabin under strict surveillance every minute of the day and night of August 12 and 13 you were unable to tell, even today you are unable to say who, from an actual observance, was going—who went in and out of Mr. Pocoroba's cabin on those two days and

(Testimony of Jess Braly.)

nights, and particularly late at night on August 12th and early in the morning on August 13th, isn't that true? A. That is true.

Q. And if other persons were there engaged in some transaction with Mr. Barri and Mr. Tocco you would be unable to observe them or their movements or to detect them, or to [91] apprehend them, isn't that right?

Mr. Hennessy: I object to all this, being argumentative.

The Court: I think all these last questions are argumentative, but you didn't object to them. I will sustain the objection.

Mr. Abrams: Q. So you do not know, neither do the other agents know whether there were any other persons with Mr. Barri or Mr. Tocco in the last hours of Saturday, August 12th or the very early hours of Sunday, August 13th, is that correct?

A. I don't know what the other agents knew.

Q. How about yourself?

A. I didn't see anything."

TESTIMONY OF EMMET GLEASON

For the United States.

Emmet Gleason, produced as a witness on behalf of the United States, having been first duly sworn, testified substantially as follows:

My name is Emmet Gleason. I live in Yuma, Arizona. I am a customs patrol inspector, for the

(Testimony of Emmet Gleason.)

United States Customs Service, and have been for about 13 years. I participated in the surveillance of Maugeri, Pocoroba, Barri and Tocco in Santa Cruz. The first time I saw Tocco was July 9, I believe. The first time I saw Barri was about July 21st. I saw Tocco and Barri frequently in the company of Salvatore Maugeri in Santa Cruz, California, at Mr. Maugeri's concession, and in Mr. Maugeri's automobile, and in San Francisco, about August 9th. On August 9th I participated in the surveillance of Maugeri in San Francisco part of the time. I saw him at the saloon of Scambellone on Grant Avenue, in front of the saloon. I saw his car there. I did not look into his car at any time. I saw two valises [92] taken out of the automobile. One was a yellow suitcase, a large one, and the other one was a smaller bag. Government's Exhibit No. 1 For Identification resembles the bag that I saw taken to 1644, I believe is the number, Grant Avenue. It was taken there by a taxicab driver. I returned to Santa Cruz on Friday, August 11th. I did not participate in the arrest of Mr. Maugeri on the 16th. I did not go to the Oakland Mole on Sunday with the other agents. I was called home by the sickness of my wife and relieved from the case.

TESTIMONY OF THOMAS E. McGUIRE

For the United States.

Thomas E. McGuire, produced as a witness on

(Testimony of Thomas E. McGuire.)

behalf of the United States, having been first duly sworn, testified substantially as follows:

My Name is Thomas E. McGuire. I am a Federal narcotics agent attached to the San Francisco office of the Bureau of Narcotics. I live at 1635 Gough Street, San Francisco. I have been a narcotics agent approximately 17 years. On August 9th, 1944, I participated in the surveillance of the defendant Salvatore Maugeri here in the City of San Francisco, at Grant Avenue and Green Street. The first time I had occasion to see the defendant, he was standing in a door on Grant Avenue, 1371 Grant Avenue. Subsequently on that day I had occasion to observe Mr. Maugeri as he left the barroom and walked into a neighboring grocery store in that vicinity. He made some purchases there and left that grocery store and walked to 1644 Grant Avenue, which I later learned was the residence of Scambellone, the owner of the bar. The automobile that I had seen Mr. Maugeri riding in was parked right opposite the bar. I looked into the automobile partly at approximately five or ten minutes before I saw him at the bar- [93] room. I should judge it was about 11:30 or 11:00 o'clock on August 9th. I saw a brown suitcase, in appearance and size and description answering this one that is here, Exhibit 1 For Identification, in the automobile. It had all appearances of that bag there. I did not see anything else in the car. There might have been something else, but I didn't go that close to the car to observe. I didn't exactly see the baggage taken out of Maugeri's car,

(Testimony of Thomas E. McGuire.)

but I did see the taxi driver and the taxicab at the side of Maugeri's car and I saw the movements of the two doors being opened, and later the taxicab drove past where I was sitting. I was sitting on the curb side of the government automobile, and I wasn't in a position to actually see what took place. The taxi driver passed us going north to Grant Avenue. However, we were unable to continue the surveillance of the taxicab, due to the fact that traffic conditions didn't allow us to turn the government car around, but I did observe the other official automobile following the taxicab. I had occasion to see a man I was told was Joe Barri while observing the house at 1644 Grant Avenue on the evening of August 9th at about nine o'clock. I did see a man that I know as Joe Barri, and Joe Tocco enter those premises at 1644 Grant Avenue, which I have been told is the home of Scambellone, the owner of the bar. I saw them leave those premises that evening. After observing them in the house of Scambellone, they remained there about ten minutes, and both of those men, that is, Joe Tocco and Joe Barri, left the premises and walked through the streets. They didn't have any luggage with them. I saw Barri in the bus station on August 10th, approximately between the hours of 3:00 and 5:20; he was observed by myself and other agents at the Greyhound bus station, Fifth and Mission Streets. The agents and myself observed the defendant enter the Santa Cruz bus. I did not go to Santa Cruz on the 10th. I was in Santa Cruz on Saturday, August 12th. [94] I

(Testimony of Thomas E. McGuire.)

went down on the 11th, Friday afternoon, and reached Santa Cruz about 5:00 in the evening. I saw Sam Maugeri on August 12th, Saturday, at his concession on the Boardwalk. He was observed between the hours, I should judge, of eight o'clock and 9:30 or ten o'clock at night, Saturday. I was in Santa Cruz on Sunday morning, August 13th, and at the observation post at the Monte Carlo Inn. From that point I was able to observe anyone entering and leaving Sam Maugeri's home. Maugeri's home is one long city block or two short city blocks distant from the Monte Carlo Inn. It is on the same street. I was observing Maugeri's house on the morning of Sunday, August 13, 1944. I observed an automobile enter Sam Maugeri's driveway leading to his home at about 9:15, between 9:15 and 9:30 on that morning. The license number of the automobile was 12 H 384. It was an old Chevrolet, I should judge about 1938 or 1939, among those years. It was a Chevrolet coupe. Later on in the evening of that day I went to San Francisco, after a conference with the district supervisor. I returned to Santa Cruz on the evening of Sunday, August 13th, arriving there at approximately 1:00 a.m., between 1:00 and 2:00 o'clock on Monday morning, August 14, 1944. I was accompanied by Customs Agent Earl Smith and Mr. Braly, and Narcotics Agent Pocoroba, and Mr. Newman. We went to the City of Santa Cruz and then went to the home, or room that Mr. Pocoroba was occupying when he was living in Santa Cruz. There Mr.

(Testimony of Thomas E. McGuire.)

Pocoroba delivered to me two cartons which are here marked Government's Exhibits 3 and 4 in evidence. My initials appear on these cartons that I received from Mr. Pocoroba at two o'clock in the morning. When they were delivered into my possession, I retained them until I delivered them to the vault in the Bureau of Narcotics office. I delivered them to the custodian in the office of the Bureau of Narcotics, at 68 Post Street. Government's Exhibit 5 in evidence is wrapping paper that answers [95] the description and appearance of the wrapping paper that was delivered to me by Pocoroba. Government's Exhibit No. 6 in evidence is the type of paper that was in the boxes that Pocoroba delivered to me at that time and that I kept in my possession until I delivered to the director of the Bureau of Narcotics in San Francisco. I participated in the arrest of the defendant, Salvatore Maugeri. The arrest took place on August 16th, at about 6:00 or 6:15 in the evening, upon Mr. Maugeri's return to his home in Santa Cruz.

Cross-Examination

On the day that Mr. Maugeri was in San Francisco with Tocco and Barri, and while he was in his automobile, I did not follow him to all the places that he went on that day. I started the surveillance of Maugeri on August 9th here in San Francisco, and on the 11th I went to Santa Cruz, and on the 12th I was in Santa Cruz. I came in on the tail end of the case. I didn't go to Santa Cruz on the 9th. I first observed the defendant Maugeri on the 9th,

(Testimony of Thomas E. McGuire.)

here in San Francisco. The first date I went to Santa Cruz was the 11th, a Friday. On that date, the 11th, we arrived in Santa Cruz earlier in the day, but did not go to the observation post until about five o'clock in the evening. From that time I was there until Sunday morning. I left with Mr. Pocoroba and the other agents to go to Los Gatos. I wouldn't be certain about seeing Pocoroba on Friday. I believe Saturday noon was the first time I saw Mr. Pocoroba. I was at the Monte Carlo Inn on Friday evening. Mr. Newman and the other agents were with me part of the time. I did not talk to Mr. Pocoroba and I can't answer as to Mr. Newman or the other agents. I saw Mr. Pocoroba on Saturday at about one o'clock, on the Boardwalk. I was by myself. I had a talk with him for about twenty or twenty-five minutes. I don't believe I saw him any further on Saturday. I [96] saw Mr. Newman and the other agents during Saturday afternoon when I was in the observation post, and Saturday evening I was with Mr. Newman and the other agents, of course. I left for San Francisco on Sunday, after we met Mr. Pocoroba and had a conference with him, which was approximately 1:30. We started driving to Los Gatos about 1:30 Sunday afternoon. I should judge I saw Mr. Pocoroba about one o'clock on Sunday. I, myself, had not heard from him up to that time. I met Mr. Pocoroba on one of the side streets in Santa Cruz at around one o'clock on Sunday. I don't recall seeing Maugeri on the 11th, because I don't believe I went down to the Boardwalk except just to pass the time,

(Testimony of Thomas E. McGuire.)

but on the 12th, Saturday, I did see him. I would judge it was about after dinner; it would probably be eight o'clock, until nine-thirty or ten in the evening. He was working at his concession. It was explained to me that his daughter operated the concession next to him, and I saw the daughter—the three concessions were close together that were under observation. That is the only time I recall seeing Mr. Maugeri in Santa Cruz on Saturday night. I would say that I saw him on the evening, and it could be Friday and Saturday. I won't say definitely whether I saw him Friday night or not. I remember placing a long distance phone call on Friday night when I arrived there, and at that occasion, I was close to the concession, and I walked up there, and my memory now serves me better, that I did see him on Friday night. On Sunday morning I was keeping a watch on Maugeri's house from the observation post in the Monte Carlo Inn, from which place I could see Maugeri's house. We had glasses available should we have needed them. I had them, and I did observe through the glasses, but I didn't use them constantly. The other men may have; they were there and available if needed. This was in the morning, I should judge around 9:00 or 9:30. [97] There were three or four men available there, and I wouldn't say exactly how long I was observing the house. I say that I observed the house between eight and ten o'clock, but I wouldn't say I had any particular time in which I observed. I was available in the observation point to observe the house during those

(Testimony of Thomas E. McGuire.)

hours, from eight to ten. It was between 9:15 and 9:30 that I actually observed the car drive up to Mr. Maugeri's house. I did not observe anyone get out; it drove in through the driveway and out of my vision. I didn't say anyone was watching before eight o'clock. I said what I was doing. The other agents were available to keep watch before eight o'clock, but I wouldn't answer as to whether they were keeping a watch. We were all in a room and it was mutually agreed that this house should be kept under observation, whether I did it or the other agents. The agreement that the house should be kept under observation must have been made prior to my arrival in Santa Cruz. When I arrived there the purpose of being there was explained to me, to observe Mr. Maugeri's house. That was on Friday evening. That was one of the general duties. That was not all of our duties. That was the purpose of the observation post, though, to observe Maugeri's house, among other things, while we were there. I contacted Mr. Pocoroba away from his cabin, but I wasn't at his cabin. It was not one of my specific duties to observe Mr. Pocoroba's cabin. I don't know what the other agents' duties were, as far as the surveillance of the house was concerned. I can tell you what I was doing, counsellor. I knew from what I had been told by Mr. Pocoroba that Tocco and Barri were staying at Pocoroba's cabin. I knew that Barri and Tocco had gone to San Francisco and had gone to this bar at North Beach with Mr. Maugeri, and had stopped at the Santa Fe depot

(Testimony of Thomas E. McGuire.)
there in San Francisco. I was told personally that Tocco and Barri returned the [98] following day or two to Santa Cruz, and again went to stay, to live with Mr. Pocoroba at his cabin; what the other agents knew about it I couldn't answer.

"Q. Now, were you supposed to keep under observation Mr. Maugeri's house and Mr. Pocoroba's cabin, also?

A. That was part of the general duty. I, myself, was to observe the house and contact Mr. Pocoroba.

Q. That is right. Now, did the agents keep under observation—did you or the other agents keep under observation Friday, Saturday, and Sunday, August 11th, 12th, and 13th, Mr. Pocoroba's cabin and Mr. Maugeri's house?

A. Well, it was not necessary to keep Mr. Pocoroba's cabin under observation, counsellor, in so far as he is a government narcotics agent and capable of observing things that transpired in that cabin, but in view of the fact that Maugeri's house, we didn't have entree or the coverage of that house, we didn't have access to that house like we did to Mr. Pocoroba's house, so we concentrated on Maugeri's house on the assumption or at—now, that you are asking me, the general idea was——

Q. Well, Mr. McGuire, how many agents were down there in Santa Cruz?

A. While I was there, there were the two customs agents and Mr. Newman and myself; there were other aegnts at different times and places.

(Testimony of Thomas E. McGuire.)

Q. Over Friday, Saturday and Sunday, August 11th, 12th, and 13th, how many agents were there?

A. The two customs agents and Narcotics Agent Newman, and myself.

Q. How many, five? A. Well,——

Q. Including Mr. Pocoroba.

A. He was down there.

Q. That makes five. A. Yes, five agents.

Q. Between the five of you, you mean to say you were not [99] able to keep both the Pocoroba cabin and Mr. Maugeri's house under observation continuously during those three days and nights?

A. Pocoroba's house was covered by Pocoroba, himself.

Q. That is inside the house; how about the outside? A. I didn't observe the outside.

Q. Did any of the agents observe the outside?

A. Well, I can't answer, the other agents were with me all the time. As a mater of fact, if you want me to tell you what Mr. Newman told me, he said he hadn't seen——

Q. No, stick to the question. Did any of the agents, to your knowledge, station themselves in or about Pocoroba's cabin in a position to observe people going in and out of Pocoroba's cabin during the day and night of Friday, Saturday, and Sunday, August 11th, 12th, and 13th?

A. I didn't do that, Counsellor.

Q. Did any other agent, to your knowledge, do it?

A. I can't answer that, I don't know.

(Testimony of Thomas E. McGuire.)

Q. You know, as a matter of fact, they were not there?

A. I wouldn't answer that directly, because Mr. Newman was not with me throughout the four days.

Q. And so far as Mr. Maugeri's house is concerned, the only observation made there was the observation you are speaking about on Sunday morning, isn't that right?

A. You mean the only thing we had seen was the car entering that Sunday morning? The house was observed for the three or four days, counsellor.

Q. Continuously?

A. I would say that while I was in the room, I observed the house.

Q. And watched from, where you were sitting in the Monte Carlo Inn?

A. Any time I was in the room I was trying to observe [100] the house. Now, whether I seen anything during that time——

Q. Well, was there an observation kept on Mr. Maugeri's house on Friday—on Saturday evening, August 12th, on through the early hours of Sunday morning, August 13th?

A. It wasn't by me, Counsellor.

Q. You didn't keep any watch?

A. I didn't.

Q. And you don't know if any other agent did, to your knowledge?

A. I couldn't answer what they did, Counsellor."

(Testimony of Thomas E. McGuire.)

Redirect Examination

The witness testified further: I saw Tocco and Barri enter and leave the apartment of Scambellone at nine o'clock on Wednesday, August 9th. I observed them for the rest of the evening. They left Scambellone's home at 1644 Grant Avenue and they boarded the streetcar and they went to the Greyhound bus station. I heard and observed them making inquiry for the bus back to Santa Cruz. That was at Fifth and Mission Streets, at approximately 9:30 at night, in my presence, and in my hearing. I heard the clerk tell them that the last bus had left. Then they left there and went to Foster's Restaurant. They had something to eat. They left there, and they went to the Telenews show on Market Street, remained in there about an hour, left there, and got into a taxicab and returned back over at the bar, Scambellone's bar, went in and had a conversation, and they left the bar, and then walked down from Scambellone's bar to the Washington Hotel, on Grant Avenue and Pine Street—Grant Avenue and Bush. They left that hotel and got into a taxicab and they went to the Whitcomb Hotel, engaged rooms, both the men engaged a room at the Whitcomb Hotel, and were roomed in their rooms, which they paid for. During most of the time I had them under observation I was joined by other agents, and at times I was by myself, but most of the time there were other [101] agents with me following them. I did not see them on the morning of Thursday, August

(Testimony of Thomas E. McGuire.)

10th; I discontinued my surveillance work the last time I saw them on Wednesday evening, when both the men were with the bellboy going to their room; I believe about 11:30 or quarter to 12:00 that night I observed Tocco come down and purchase some cigarettes, and he left and went back upstairs to his room at the Whitcomb Hotel. I should judge it was close to midnight the last I had seen of either one of the two men.

TESTIMONY OF VANCE NEWMAN

For the United States

Vance Newman, produced as a witness on behalf of the United States, having been first duly sworn, testified substantially as follows:

My name is Vance Newman. I reside in San Francisco. I am a Federal narcotics agent, and have been since 1937, January, I participated in the surveillance of the defendant, Sam Maugeri, at Santa Cruz, in the progress of this case. I started my work on the continuous investigation of this case on March 2, 1944. I left Santa Cruz on March 16th, and I didn't go back again until April 10th, and except for another period of four or five days I was in Santa Cruz almost constantly until August 14th. When I first went to Santa Cruz I lived at a tourist court out on Soquel Road, but along in April I went to 29 Park Avenue, and rented a house. I moved into the Monte Carlo Inn

(Testimony of Vance Newman.)

around June 10th. The Monte Carlo Inn is on Third Street, right at the junction of Main. Main Street doesn't go through Third. The Monte Carlo is on Third Street, looking right down Main Street. From the Monte Carlo Inn I was able to observe the entrance to the Maugeri yard, which was distant less than a Santa Cruz block. The Maugeri house [102] is about one building lot away from Third Street. The Monte Carlo Inn is on Third Street. Maugeri's house is on Main Street one building lot away from Third.

I know Benedict Pocoroba. I know the cabin he occupied in the Miller Apartments, Unit No. 4. That is not observable from our observation post at the Monte Carlo Inn. It was seven or eight blocks away. I met Mr. Pocoroba in Kansas City, back in the summer of 1939. He came to Santa Cruz on May 1, 1944. Thereafter I observed him frequently. I saw him in the company of Salvatore Maugeri, the defendant in this proceeding, many times. I saw him at Maugeri's beach concession many different occasions; I saw him riding in Maugeri's car with Maugeri and other members of his family; I saw him enter and leave Maugeri's house; I saw him going to the theatre with Maugeri. One occasion I saw him in the Maugeri car on my way down to the Post Office. I saw Maugeri take him to the Graystone Hotel on the evening of May 10th. They came out of Mr. Maugeri's house.

I know Joe Tocco. I first saw him to know him on July 9, 1944. I saw him on Pacific Avenue in

(Testimony of Vance Newman.)

Santa Cruz; he went into the Big Pine Pharmacy, and he went into the Pet Creamery; then he went back to 32 Main Street, Maugeri's house. I saw him in the company of Maugeri many times. I saw him going to Maugeri's house frequently. He was living in Maugeri's house at that time in Santa Cruz.

I know Joe Barri. I first saw him on July 21st on the beach right across from Maugeri's concession at Santa Cruz. I saw Joe Barri in the company of Salvatore Maugeri repeatedly. I saw him enter and leave Maugeri's house; I saw him on the beach with Maugeri, I mean on the Boardwalk. I followed the defendant and Tocco and Barri to San Francisco on August 9th. Inspector Braly was in the car with me. Customs Agent Hayes and Customs [103] Inspector Gleason were in another car. I saw them in the North Beach section. I saw Maugeri's car on Grant Avenue, in the vicinity of Grant and Green. I know where Scambellone's bar is at 1371 Grant Avenue. The car of the defendant was a short distance away from that bar. I saw Tocco and Barri in or about the bar on that day. I looked into the car that was driven by Mr. Maugeri on that day while it was parked in that neighborhood. It was shortly after noon. I observed some luggage in there. It seems to me there were at least two pieces of luggage; one of them was a large yellow piece of luggage, such as we see down there, and the other was a darker piece. I am pointing to Government's Ex-

(Testimony of Vance Newman.)

hibit No. 1 For Identification, the tan suitcase. I saw a piece of luggage that appeared similar to that in the car. It was in the back part of the car, on the floor. There was another piece of luggage, a dark piece of luggage; at least another piece. Government's Exhibit No. 2 For Identification looks very much like it. I saw luggage taken out of the car of Maugeri on that afternoon where it was parked. A taxicab driver pulled alongside and opened the door, took two pieces of luggage out, put them in the cab, and drove away. This tan suitcase was one of the pieces of luggage. I tried to follow the cab. The cab drove north on Grant Avenue. My car was parked on Grant Avenue facing south, down near the end of the block. I drove down to Green, then turned right. I tried to drive around the block but by the time I got back I couldn't see him. I did not see Tocco or Barri that evening in San Francisco, the evening of August 9th. I saw Tocco about ten minutes after five on August 10th, at Grant and Filbert Streets. I didn't see him leave San Francisco. I got back to Santa Cruz about quarter of one, 12:45 p.m. on August 11th, Friday. I saw Maugeri on Friday after I returned to Santa Cruz. I saw him at his concession once; I saw him at his concession maybe more than [104] once, but I saw him on the beach with Agent Pocoroba about ten o'clock in the evening of Friday, August 11th. I saw Maugeri on Saturday, August 12th, at the beach concession. He was there in the afternoon, and on the evening I saw him for the last time around

(Testimony of Vance Newman.)

ten o'clock in the evening. I saw Tocco in Santa Cruz on August 12th. I saw him in the morning. I saw him on the Boardwalk. I did not see Pocoroba on Saturday, August 12th. I saw Pocoroba on Sunday, August 13th. The first time I saw him was on Beach Street, shortly after one in the afternoon. He telephoned me about ten minutes of one. Pursuant to that I met him on Beach Street. Inspector Braly was with me, Narcotics Agent McGuire was with me, and Inspector Earl Smith was there, too.

"Q. Did he then tell you what had happened in the cabin? A. Yes, sir.

Q. That night previous and on the morning——

A. Yes.

Q. ——of Sunday?

Mr. Abrams: Well, now, this is hearsay.

Mr. Hennessy: Yes. I simply wanted to lead up to the arrest. However, it is all right; I will withdraw the question."

The witness testified further: We contacted Director Manning. Mr. McGuire did the actual telephoning. We agents then went to the Oakland Mole here and made some search of trains with the District Supervisor. I returned to Santa Cruz between 1:30 and 2:00 on the morning of August 14th, Monday. Narcotics Agent McGuire, Customs Inspector Braly, Customs Agent Earl Smith, and Agent Pocoroba accompanied me. We went to Agent Pocoroba's cabin at the Miller Apartments. He had two large cardboard boxes and certain wrapping paper and tape that he turned over to us. He actu-

(Testimony of Vance Newman.)

ally handed it to Agent McGuire. The cardboard box- [105] es were on the floor of his cabin in the front room as you enter. Government's Exhibit 3 and 4 in evidence are the two cardboard boxes turned over by Agent Pocoroba. Here are my initials on each one, and the date, August 14th, and also on this one. I observed those boxes there. There were drippings of opium in both boxes. At that time Government's Exhibit 5, the brown wrapping paper, and Government's Exhibit 6, some tape, were also delivered by Pocoroba to McGuire. I then returned to San Francisco. I left Santa Cruz about quarter to eleven on August 14th and drove in to San Francisco. I left for the East on that night, Monday. I took the six o'clock plane to Chicago on the evening of August 14th, accompanied by Inspector Braly. Upon arriving in Chicago I was met at the airport by the Director of the Bureau of Narcotics in Chicago. On the morning of August 16th I went to the Chicago-Northwestern Railroad Station at Chicago, accompanied by Agent Walsh, from the office of the Bureau of Narcotics. We went there about seven o'clock in the morning. We watched the incoming trains and observed the people coming in, or getting off those trains. Those trains were coming from the West. I saw Tocco on that morning. He arrived on train No. 28, which was due in at 8:30, but it did not get in until 9:15 a.m. It came in in two sections. I saw him get off the second section of that train. That train came from San Francisco. I saw Tocco leave the

(Testimony of Vance Newman.)

second section of that train and carrying a blue cloth bag, that is Exhibit 2, and I followed him. He walked down to the main level of the station. He stood there at the place where the baggage is delivered, and about fifteen minutes later the baggage trucks were pushed up. He claimed the large yellow suitcase, which is Government's Exhibit No. 1, and when he had both pieces of luggage he called for a cab, and then Agent Walsh and I placed him under arrest. When we placed him under arrest we took posses- [106] sion of those two pieces of luggage, the cloth overnight bag and the tan suitcase. We went to the Chicago office of the Federal Bureau of Narcotics. I got the keys to open the suitcase from Tocco. I opened the blue bag right there in the railroad station. It was locked. Tocco gave me the key.

"Mr. Abrams: Your Honor, I should make an objection to all this testimony as to what took place in Chicago as far as the defendant Tocco was concerned, not in the presence of the defendant, or not binding upon the defendant.

Mr. Hennessey: It is part of the res gestae.

The Court: You say you should make an objection. I don't know whether you are objecting or not.

Mr. Abrams: Well, I am objecting. I let a lot of this go in to get the drift of it, but, of course, what he has testified so far I will ask be stricken as not binding on the defendant.

Mr. Hennessey: It is part of the res gestae.

(Testimony of Vance Newman.)

The Court: Well, the objection is overruled. Exception noted."

The witness testified further: I opened the small bag in the station. It was there by some freight elevators. I led him away from the place where the crowd was to a place about fifteen or twenty yards from there, in front of some elevators on the ground floor of the station. In the bag I found some cans of opium. They were wrapped in brown paper and sealed with brown paper tape. There were about twenty cans in the small blue overnight bag. I opened the tan suitcase when I got to the office of the Bureau of Narcotics. I found 75 cans of opium and found a package of opium weighing a little over eight ounces, and I found eight ounces of morphine in a sugar box in the tan suitcase. [107]

"Q. Are those things that you found contained now in those two bags?

A. Yes, with the original wrapping removed.

Q. I show you those pieces of paper and a piece of tape that is at this time in this box, and ask you whether or not you ever saw those pieces of paper and the tape before.

A. Yes. Here is my initials and the date, August 14, 1944, and Agent Walsh's initials.

Mr. Abrams: My objection, your Honor, of course, goes to this line of testimony referring to what happened in Chicago between the agents and Tocco.

The Court: What is the basis of your objection?

(Testimony of Vance Newman.)

Mr. Abrams: I made the objection before, that it is incompetent, irrelevant and immaterial and not binding upon the defendant.

The Court: Objection overruled; exception.

The Witness: Here is another piece and the date, August 14, 1944, my initials, V. N., and Agent Walsh's initials. There are other pieces in there also initialed and dated by me.

Mr. Hennessy: Q. All those short pieces of brown wrapping paper are pieces of paper that you took off the cans of opium?

A. Yes. The packages are sealed with this tape.

Q. The packages of opium? A. Yes.

Q. This brown paper, gummed paper tape?

A. The paper was wrapped around the can of opium and it was sealed by this tape. It is still stuck here, as you see.

Mr. Hennessy: I offer in evidence, may it please the Court, these pieces of short paper and tape and ask they be marked Government's Exhibit No. 7 in evidence.

Mr. Abrams: I object to that as incompetent, irrelevant [108] and immaterial and not binding upon the defendant.

The Court: Objection overruled.

Mr. Abrams: Exception.

(The paper and tape were marked U. S. Exhibit 7 in evidence.)

Mr. Hennessy: Q. You returned to San Francisco on what date, Mr. Newman?

A. I got in on the morning of August 22.

(Testimony of Vance Newman.)

Q. Did you bring those cans of opium with you?

A. Yes, I did.

Q. You marked each of the cans, did you?

A. Yes, I did.

Q. What did you do with the cans when you arrived in San Francisco?

A. I put them in the vault at our office, 68 Post Street. Later I delivered them to the chemist.

Q. You delivered them personally to the chemist? A. Yes, I did.

Q. What chemist did you deliver them to?

A. Mr. Love's office, U. S. chemist.

Q. Where is his office?

A. Empire Hotel Building, the 11th floor."

The witness testified further: I found 20 cans of opium in the blue overnight bag and 75 cans of opium in the tan suitcase. I scratched my initials and the date on each can with a nail. There was a paper bag containing eight ounces of opium, a trifle more. Those cans of opium are in the two bags at the present time, Government's Exhibit No. 1 For Identification and Governmnet's Exhibit No. 2 For Identification, respectively. I have not examined them since I took them to the chemist.

"Q. Will you look and see if they are in there. You are taking certain cans of opium out of this overnight bag which is now Government's Exhibit No. 2 For Identification; is that correct?

A. Yes. Nineteen cans, and there is one over there. [109]

(Testimony of Vance Newman.)

Q. This can, Defendant's Exhibit A For Identification, was taken out of that dark bag?

A. I took it out the other day.

Q. Defendant's Exhibit A For Identification is one of the cans that was contained in the blue overnight bag when it was taken from the custody of Joe Tocco after his arrest?

A. Well, I don't know that it was in the blue bag, but it was one of the cans of opium that Tocco had.

Q. Is it marked?

A. This label probably covers the mark.

Q. Will you see how many cans there are in that tan suitcase? A. Certainly.

Q. Government's Exhibit 1 For Identification.

Mr. Abrams: If he knows how many there are there, that is all right.

Mr. Hennessy: Q. Well, you said there were 75?

A. At the time, yes. There still seems to be about 75 in there.

Q. Is there a brown paper bag containing opium there?

A. No, it is not here, but there is a package in this bag; it may be in here.

Q. Let's look and see.

A. It is sealed. Shall I open it?

Q. Yes. Is this the brown paper bag that you found in the overnight bag after you arrested Tocco? A. No, sir, in the suitcase.

Q. In the suitcase? A. Yes.

Mr. Hennessy: I desire to offer these cans of

(Testimony of Vance Newman.)

opium, also this brown paper bag for identification and ask that they be marked Government's Exhibit No. 3.

The Court: I think we have an exhibit No. 3.

Mr. Hennessy: I wish to offer all the cans of opium, the 20 cans of opium which were found in the blue overnight bag and the 75 cans of opium which were found in the tan [110] suitcase, for identification and ask they be marked Government's Exhibit No. 3.

The Clerk: No; it will be No. 8.

Mr. Hennessy: Not in evidence; this is for identification.

The Court: Yes.

Mr. Hennessy: No. 8 For Identification.

Mr. Abrams: I object to that as incompetent, irrelevant and immaterial.

Mr. Hennessy: Also I ask that this brown paper package be marked Government's Exhibit 9 For Identification.

Mr. Abrams: Object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

(The cans of opium were marked U. S. Exhibit 8 For Identification; the brown paper bag was marked U. S. Exhibit 9 For Identification.)

Mr. Hennessy: Q. What did you do with those cans and the brown paper bag marked Government's Exhibits 8 and 9 For Identification?

A. The cans in this bag?

(Testimony of Vance Newman.)

Q. Both; the cans you found in both the bags and the brown paper bag.

A. Took them over to Mr. Love's office. He is the U. S. chemist. I gave them to Mr. Mallory.

Q. Is Mr. Mallory connected with the U. S. chemist?

A. He is an assistant chemist, I believe is his title.

Q. When did you deliver Exhibits 8 and 9 For Identification? A. August 28, 1944."

Cross-Examination

The witness testified further: I was one of the agents that followed Mr. Maugeri in his car, in which were Mr. Tocco and Mr. Barri, to San Francisco on August 9th. I did not see Maugeri [111] at all times during the day. He may have gone places where I could not have seen him. I started this investigation about March 2nd. I had been in Santa Cruz before that time, but from March 2nd on, except from March 16th to April 10th, when I was away from Santa Cruz, I was down there continuously, with the exception of other periods of four or five days each, when I would come in for court or to see the District Supervisor. As well as I remember, for the period from March 16 to April 10th when I left Santa Cruz there were no other agents there during that period. After April 10th, and except for the trip that was made by Maugeri with Tocco and Barri to San Francisco on August 9th, it is my recollection that there was always somebody down there at Santa Cruz in addition to

(Testimony of Vance Newman.)

Mr. Pocoroba. I never recall more than five agents being there at one time, and when I say "agents" I am also including customs inspectors. It might be well to say officers. At the beginning of my investigation at Santa Cruz I ran across a man named Lagaipa. I saw him in Santa Cruz, and saw him with Mr. Maugeri at times. I never saw Lagaipa with Tocco. I saw Lagaipa with Mr. Pocoroba. Nobody connected with our office saw Lagaipa since the night of June 5th. I first saw Lagaipa on this investigation on March 2nd, when I went there. The last time that I, myself saw him was early in June, but he was last seen by any of our men on June 5, according to my best information. Between March 2nd and June 5th Mr. Lagaipa was seen in Santa Cruz almost daily, either by myself or the other agents. He was watched by myself or the other agents. He was under surveillance. I knew that Lagaipa had left New York, or I heard that he had left New York for the West Coast. I didn't see him come out here. I spent half a day in New York trying to find him and I couldn't, and I found he had left New York for the West Coast. He was heard of in San Francisco before [112] we heard he went to Santa Cruz. Then we heard he went to Santa Cruz. During the time that the other agents and myself were in Santa Cruz we kept Mr. Lagaipa, Mr. Tocco, Mr. Barri, and Mr. Maugeri under surveillance. We use our judgment on those things. We don't follow him around and hold him by the coattails, but the gen-

(Testimony of Vance Newman.)

eral idea and part of our duties is to keep any suspect under surveillance, anyone suspected of having anything to do with narcotics, and to have contact with them as much as possible through our undercover man, Mr. Pocoroba. We were all five working together. I had nothing to do with bringing Mr. Pocoroba out here from the East Coast to the West Coast to have him associate with these men. That is a matter that was over my head, but that was his purpose down there, the general idea. When Pocoroba arrived there Lagaipa and Maugeri were there, and later Tocco and Barri came. He was supposed to associate with them. He was supposed to find out as much as he could about what they were doing.

"Q. And as part of those duties as a narcotic agent doing undercover work, he was supposed to, if he could, to try and engage in some narcotic transaction with any or all of those men, isn't that true?

A. No, I wouldn't say that—not engage in narcotic transactions. That is a crime. He couldn't commit a crime.

Q. How long have you been an agent?

A. Since January, 1937.

Q. And you mean to say since that time your department doesn't sanction the method of an undercover agent or informed entering into narcotic transactions with somebody suspected of dealing in narcotics for the purpose of catching and apprehending them? A. We buy narcotics, yes, sir.

(Testimony of Vance Newman.)

Q. That is what I mean; that is the common practice, isn't it?

A. That is the general practice, yes, sir.

Q. That is the way you catch most of your dealers or peddlers, [113] isn't that so?

A. I wouldn't say most of them.

Q. By catching them in a transaction, selling narcotics or having a deal on?

A. We catch peddlers by buying narcotics from them sometimes, yes, sir.

Q. Yes. Money is passed to them, which is usually marked money, isn't that right?

A. If it is Government money.

Q. And the suspect, the dealer or peddler, would hand over the narcotics?

A. That is the way a sale violation works.

Q. And that is usually done between the suspected narcotic dealer or peddler and the undercover man you have working, such as Mr. Pocoroba, an informer, if you use an informer?

Mr. Hennessy: I object to this as being incompetent, irrelevant and immaterial and not proper cross-examination.

Mr. Abrams: I think it is. I think it is highly important, and I have a right to develop it on cross-examination. Your Honor, it is all part of the work of these agents, and Mr. Newman was down there, and we have a right to go into it, because he has testified as to his activities down there.

The Court: It is not proper cross-examination and your rights are not cut off because you have

(Testimony of Vance Newman.)

already had the cross-examination of the agent Pocoroba as to just exactly what he did.

Mr. Abrams: Your Honor recalls Mr. Hennessy made an objection to this particular line of testimony on Mr. Pocoroba's cross-examination, and I said I would reserve it until some other agents take the stand who were qualified to testify.

The Court: I don't think it is proper and I don't think your rights have been invaded. I will sustain the objection. You may have an exception.

Mr. Abrams: Exception, your Honor.

The Court: Very well.

Mr. Abrams: Q. And in the case of Mr. Pocoroba, Mr. New- [114] man, if Mr. Pocoroba was able to arrange a transaction with any of these men for the purchase of narcotics he would be furnished with the money for it, isn't that true?

A. (No response.)

Mr. Abrams: Don't look to Mr. Hennessy to object to it.

The Court: Whether Mr. Hennessy objects to it or not, I assume there is an objection made.

Mr. Hennessy: I will make an objection. I consider it objectionable.

Mr. Abrams: I am asking him what happened in this particular case.

The Court: I have already sustained the objection. It is not proper cross-examination of this witness. You may have an exception.

Mr. Abrams: Exception."

The witness testified further: If we could have

(Testimony of Vance Newman.)

bought narcotics from any of these men, Barri, Tocco, Maugeri, and Lagaipa, on terms acceptable to the bureau, I suppose we would have done so. If I could have bought narcotics from any of those men and the bureau approved, I would have done so. I can't answer for the others, but for myself, under approval of the bureau I would have done so. Before going to Santa Cruz the general plan was discussed with Major Manning, my supervisor, and it was discussed among the agents many times during these months down there. We were all appraised of what we were being sent to Santa Cruz for, and what our duties would be down there. We were not always all together when these discussions took place and when Major Manning gave us instructions. We were aware of the general plan in mind in going to Santa Cruz, and whom we were to contact, and whom we were to shadow and follow, and what we were to do. We were to keep these men under [115] surveillance according to the dictates of our good judgment, which included Mr. Pocoroba, to keep him under surveillance, even though he was an agent, to watch what he was doing, and see whom he contacted, so whatever he said or testified to could be corroborated in this court. We were to do that according to the dictates of our judgment. If it could be arranged that any of the agents could make a purchase of narcotics from any of these men in Santa Cruz we would go ahead and do it, subject to proper approval.

"Q. And this would be one of the most im-

(Testimony of Vance Newman.)

portant, probably the most important phase of that work, isn't that right?

Mr. Hennessy: I object to the question as calling for the opinion and conclusion of the witness, if it pleases the Court.

The Court: I sustain the objection.

Mr. Abrams: Q. And in the case of Mr. Maugeri, following that up now, if you or any of the other agents doing your work down there, pursuing your duties, could have arranged a transaction with Mr. Maugeri whereby you could get him to deliver to you or Mr. Pocoroba or any other agent some narcotics and received marked money in exchange—if that could have been done, you would have done it?

Mr. Hennessy: I object to it as being asked and answered.

Mr. Abrams: I said generally before, and now I am applying it to Mr. Maugeri.

The Court: I think that objection is good as well as a number of other objections to it. I will sustain the objection.

Mr. Abrams: May I have an exception?

The Court: Yes. [116]

Mr. Abrams: Q. That is what you were trying to do down there?

Mr. Hennessy: The same objection.

The Court: Sustained.

Mr. Abrams: Q. When you were down there, weren't you and the other agents attempting all the time you were down there to have Mr. Maugeri de-

(Testimony of Vance Newman.)

liver some narcotics to you or to Mr. Pocoroba and receive marked money——

Mr. Hennessy: Objection. It is not proper cross-examination, and also it has been asked and answered.

The Court: I will sustain the objection.

Mr. Abrams: Exception, please.

The Court: Exception noted."

The witness testified further: While I was in Santa Cruz I was not in constant touch with Agent Pocoroba, nor would I say I was in touch with Mr. Pocoroba as often as it was necessary for Mr. Pocoroba to contact me, either in person or by phone. The man was working under difficulties. I don't know what was in Mr. Pocoroba's mind all the time, but there may have been times he wanted to contact us but wouldn't be able to. He would have to tell you about that. If it was possible for Mr. Pocoroba to communicate with me or the other agents at any time that he had some important message for me, or some new development took place, he would do so. I wouldn't say that was done frequently; now and then, yes, sir. I mean by "now and then," that there were days when I didn't see the man. For instance, I knew he was going to San Francisco with Maugeri, and I didn't bother to follow him; I didn't bother him all that day. When Mr. Pocoroba went to Merced to visit his boy I think he was gone two or three days. I know I heard from Pocoroba and talked to him over the phone and saw him now and then, but

(Testimony of Vance Newman.)

whether it was every day or [117] every other day, I couldn't say. The agents were not always all together down there. We split up. Braly and I were together, and Hayes and Gleason. I feel quite sure I am not the only one Pocoroba talked to. I cannot answer for the other agents. I talked to him at times, yes. On August 9th, the day that Mr. Maugeri was followed in his car with Tocco and Barri to San Francisco, I didn't either see or talk to Mr. Pocoroba. I do not know if any other agent did. I don't remember if I talked to Pocoroba on the 8th. On Thursday, August 10th, I didn't talk to or see Mr. Pocoroba. If any other agent did I do not know. On Friday, August 11th, I saw and talked with Pocoroba for maybe twenty minutes.

"Q. Well, did you testify 20 or 25 minutes? You met him about 1:00 p.m. on the Boardwalk and you talked to him for about 20 or 25 minutes?

"A. It was on the afternoon of the 11th, I may have said 25.

Q. Could it be 20 or 25 minutes?

A. It could be.

Q. Not a few minutes?

A. 'A few' is a relative term; 20 or 25.

Q. Yes. And did you see him, Mr. Pocoroba, from that time on until Sunday at 1:00 o'clock?

A. Yes, sir, I saw him on the evening of the 11th again, but I didn't talk to him.

Q. You saw him again on the evening; you saw him twice that day? A. That is right.

(Testimony of Vance Newman.)

Q. That is twice on Friday?

A. That is right.

Q. Did you see him on Saturday, the next day?

A. No, sir.

Q. Then you didn't see him until Sunday, the next day at 1:00 o'clock?

A. A few minutes after 1:00, yes, sir.

Q. Now, did you or the other agents, to your knowledge, keep Mr. Maugeri's house or Mr. Pocoroba's cabin under observation Thursday, Friday, Saturday or Sunday?

A. I know I didn't, I [118] don't know about the others.

Q. What is that?

A. I know I didn't keep them under constant observation.

Q. You didn't? A. No, sir.

Q. And you don't know about the others?

A. No, sir.

Q. You didn't notify the others to do it?

A. No, sir.

Q. Nor did they notify you? A. No, sir."

The witness testified further: I saw Mr. Pocoroba about 1:00 o'clock on Sunday, August 13th. At that time his condition was normal, I didn't see anything wrong with it; possibly a little bit excited, but nothing like he might have been, considering what he had been through. He was not so very nervous and excited, as I say, considering what he had been through. There was no discussion or criticism

(Testimony of Vance Newman.)

about the fact no one was watching Agent Pocoroba's cabin.

"Q. Yes.

A. Absolutely not. I would not go near the place.

Q. Why?

A. Because two dope peddlers were in there.

Q. Tocco and Barri?

A. Yes, sir, they were eating and sleeping there with Agent Pocoroba and one was scared to death; I wouldn't go near the place.

Q. Tocco and Barri, whom you considered two dope peddlers, were in there? A. Yes.

Q. And you wouldn't go near the place?

A. Because we had our own man eating and sleeping in there with them.

Q. And you were depending on Pocoroba not only to sleep and eat with Barri and Tocco and find out everything about them, but you were also depending on him to catch them single handed and put them under arrest and deliver them to you five fellows for prosecution? A. Did I speak——

Q. Or was that your job down there?

A. My job was doing [119] whatever was necessary to be done.

Q. Your job was to apprehend them, wasn't it?

A. I wouldn't say that, my job was to conduct the surveillance and do whatever was to be done to enforce the laws.

Q. You have the power of arrest, don't you?

A. As far as I know.

(Testimony of Vance Newman.)

Q. You carry a gun, don't you? You have a gun on you now, don't you?

A. Not now, but one was issued.

Q. You had one down there? A. Yes.

Q. Did the other agents have guns——

Mr. Hennessy: This is not proper cross-examination. I object.

The Court: Objection sustained.

Mr. Abrams: I think I am entitled to this examination. I should not be excluded from it just because it is getting hot for the Government.

The Court: I don't see what you are getting at. I will sustain the objection.

Mr. Abrams: We are testing the credibility of the witnesses here. This all goes to the credibility of these witnesses showing a lot of conflicts and unbelievable testimony. The jury has a right to hear it all.

The Court: I sustained the objection already. You may have an exception.

Mr. Abrams: Exception.

Q. And if you could have caught Barri and Tocco red-handed, you would have done so, would you?

Mr. Hennessy: I object to that as being a hypothetical question.

The Court: Objection sustained. It is a hypothetical question; it is not proper cross-examination. [120]

Mr. Abrams: Exception, please.

The Court: You may have an exception.

(Testimony of Vance Newman.)

Mr. Abrams: Q. In other words, you and the other agents made no effort to apprehend or take into custody Tocco and Barri, is that true, at that time, on any of those days, Friday, Saturday and Sunday?

A. Yes, I made efforts to apprehend them, take them into custody on Sunday.

Q. Who? A. I did.

Q. Who did you make an effort to take into custody?

A. Tocco and Barri, both, if I could have found them.

A. After 1:00 o'clock on Sunday? A. Yes.

Q. After you missed the boat?

A. After I talked to Agent Pocoroba, yes, and after I talked to Major Manning, I tried to catch Tocco and Barri.

Q. But prior to 1:00 o'clock Sunday——

A. That is right.

Q. You made no effort to apprehend or take into custody Tocco or Barri?

A. I had nothing to arrest them for that I know about.

Q. And you made no effort to keep them under observation at Pocoroba's cabin during those days, did you?

A. I didn't watch the cabin, no, sir.

Q. What?

A. I didn't watch the cabin.

Q. Neither did the other agents?

(Testimony of Vance Newman.)

A. You will have to ask them, but I didn't want to go near that cabin.

Q. Because you were afraid, is that it?

A. I wasn't afraid for myself, for my personal safety, I was afraid I would spoil the case.

Q. You thought you would spoil the case?

A. I was afraid I might, yes.

Q. Wouldn't you be able to place Pocoroba's cabin under observation without Tocco and Barri knowing it? A. Well, they [121] were inside.

Q. Isn't that the nature of your work?

A. It is very possible I could have placed it under observation without Tocco and Barri knowing it because they were holed up in the place, but others might have known.

Q. They might have seen you all the months following these fellows around from San Francisco to Santa Cruz?

Mr. Hennessy: I object to this line of questioning.

The Court: Sustained. I sustain the last objection on the ground it is argumentative.

Mr. Abrams: Exception please.

The Court: Exception noted."

The witness testified further: At this morning's session Major Manning was sitting in one of the front seats here in court while I was testifying. I did not have occasion to look to him for guidance while I was being questioned during this morning's session. I looked over toward the counsel table, yes. I did not testify this morning that I didn't keep

(Testimony of Vance Newman.)

Pocoroba's cabin under surveillance on Saturday night, August 12th, or early Sunday morning, Aug-13th, because I thought that was Pocoroba's job, and that there were two dangerous narcotic peddlers in the house, there, and I didn't want to be around. That is not what I said. I said that I didn't want to go near Pocoroba's house, because I didn't want to alarm these men, that there were two peddlers at the time in Pocoroba's house, and I knew there was one of them that had been almost scared to death in San Francisco, and I didn't want to frighten him any worse.

"Q. As a matter of fact, Mr. Newman, that was your duty, and a part of the duties of a narcotic agent in a case of this kind, to shadow a suspected person and keep him under surveillance all the time? [122]

Mr. Hennessy: I object to that as argumentative and not proper cross-examination.

The Court: Sustained on the ground it is argumentative.

Mr. Abrams: Exception."

The witness testified further: Up until these last two or three days leading into August 13th, I and the other agents kept Mr. Maugeri and Mr. Tocco and Mr. Barri and Mr. Pocoroba and Mr. Lagaipa, while he was in Santa Cruz, under observation as much as we could see, as much as we thought was necessary and practicable, yes. We did not shadow practically every movement they made, no. We did not follow them all the time. One of our men fol-

(Testimony of Vance Newman.)

lowed Tocco and Barri to the stationery store. Tocco and Barri were followed with Mr. Maugeri to San Francisco. I remember following Mr. Maugeri to San Francisco twice. I remember that personally. I did not follow Tocco and Barri to Felton. I went up there after they had already been there, but I didn't follow them. I don't remember any agent testifying here in court that he followed Tocco and Barri to Felton when they rented the cabin. I remember testifying the other day in this courtroom on the hearing of a motion in behalf of the defendant Tocco. It was last Saturday, when Mr. Gillen and Mr. McDonald, attorneys for Tocco, were questioning me.

"Q. Yes. Do you recall at that time, at that hearing, Mr. Gillen, Mr. Tocco's attorney, asked you this question and you gave the following answer:

'Q. I will ask you this: Did Agent Pocoroba make any explanation to you, or to any other member of the Federal Narcotics Division in your presence, as to the reason why he waited from three o'clock in the morning until one o'clock in the afternoon before reporting officially to anybody in authority, or in equal author- [123] ity with him, that Tocco and Sam Maugeri had departed with 105 cans of opium from the cottage at Santa Cruz?

A. I don't remember Agent Pocoroba's exact language, but the general idea was that he intended to go ahead in an under-cover capacity, even make buys on his own, find out where the stuff came from, where Maugeri got it; in other words, he felt the

(Testimony of Vance Newman.)

investigation was still open from an under-cover viewpoint, and that he felt any arrest then would expose him as an under-cover witness. What the exact language was, I don't remember, but that was the general idea. That is what I got.'

Do you recall that being your testimony?

A. Yes. I don't recall the exact words, but substantially that.

Q. Is that the reason why you did not watch, or the other agents did not watch Pocoroba's cabin on Saturday night and Sunday morning, August 12th and 13th, or is it for the reason you gave just a little while ago on the stand and this morning?

Mr. Hennessy: I object to that on the ground it is incompetent, irrelevant, and immaterial, what the reason was. It is not proper cross-examination.

Mr. Abrams: I will submit it.

The Court: I will sustain the objection.

Mr. Abrams: Exception."

The witness testified further: On Saturday evening, August 12th, Customs Agent Earl Smith and I were in the vicinity of the Boardwalk in Santa Cruz up until shortly after ten o'clock. I was on the Boardwalk, and I was near Maugeri's concession quite a bit of the time, all the evening near Maugeri's concession on the Boardwalk, until about ten o'clock. When I left the Boardwalk about ten o'clock Maugeri was either at his concession there [124] or in the vicinity. I saw him leave the concession and go down the Boardwalk once. Then he started back to work, and he was close by, if he was not at his concession. When I left the Boardwalk at ten

(Testimony of Vance Newman.)

o'clock I do not know whether any other agents were left there watching Mr. Maugeri. I went to the Monte Carlo Inn around ten o'clock, shortly after ten o'clock, with Agent Smith. I remained there at the Monte Carlo Inn for the rest of the evening. I slept there. I don't remember what time I got up the following morning. I got up at the usual time. I am rather an early riser. I did not remain at the Monte Carlo Inn until I heard from Pocoroba at one o'clock on Sunday. I went out for breakfast and walked around a bit. That was before one o'clock. Customs Agent Earl Smith was with me. He was new on the job and I took him along with me to show him what it was all about. As well as I remember, I drove Agent Smith up to church, he wanted to go to church, early mass, and I picked him up at eleven o'clock, or shortly thereafter. Of my own knowledge, I don't know what the other agents were doing Saturday night. I saw them, but I was not with them all the time. As I explained before, we were paired off. I was with Customs Agent Smith at that time, and Agent McGuire was with Customs Inspector Braly. I don't know where they were all the time. I ran across them once in a while, but I was not with them constantly. They went to the Monte Carlo Inn Saturday evening. They did not go with me. They got there sometime during the night. We all went to bed. There were three of us in one room, and Smith went to bed in the room across the hall. We all got up at about the same time on Sunday morning. We went out for

(Testimony of Vance Newman.)

breakfast. I don't remember if we went out together. Some of the boys went to church, and then I dropped down in the vicinity of the Holy Cross church and picked up the fellows who had gone there about eleven o'clock. [125]Pocoroba is a Federal narcotics officer. I don't know his C.A.F. He has the power of arrest. As an under-cover man he would not carry a gun. I am satisfied he didn't have a gun there.

TESTIMONY OF GEORGE E. MALLORY,

for the United States.

George E. Mallory, produced as a witness on behalf of the United States, having been first duly sworn, testified substantially as follows:

My name is George E. Mallory. I live in San Francisco. My business address is Room 1103 Empire Hotel Building. I am a chemist employed by the United States Treasury Department. I have been so employed over twenty-three years.

"Mr. Hennessy: Do you want to stipulate to his qualifications?

Mr. Abrams: Yes, he is fully capable of testifying.

Mr. Hennessy: Q. In your capacity as a Government chemist, were certain cans of opium delivered to you on the 28th of August 1944?

A. Yes, sir.

(Testimony of George E. Mallory.)

Q. Would you look at those cans of opium here and see if those were the cans delivered to you?

Mr. Abrams: We will stipulate those are the cans.

Mr. Hennessy: You will stipulate they are the same cans?

Mr. Abrams: Yes.

Mr. Hennessy: Q. Referring to the cans of opium, being Government's Exhibits 8 and 9 for Identification, did you make an analysis of those cans of opium?

A. I made an analysis of all the cans in those packages.

Q. That is the tan suitcase, being Government's Exhibit No. 1 For Identification and the leather overnight bag, being Government's Exhibit No. 2 For Identification? A. Yes, sir. [126]

Q. And what was the result of those analyses?

A. The cans contained smoking opium.

Q. Did you make an analysis of any tracings on those two cardboard containers, being Government's Exhibits 3 and 4 in evidence?

A. Yes, sir.

Q. Did you find any opium in the tracings on those containers?

A. In the bottom of both of those boxes there was smoking opium sticking all over the box.

Mr. Hennessy: That is all. Take the witness.

Mr. Abrams: No questions.

Mr. Hennessy: That is all. The Government rests.

(Testimony of George E. Mallory.)

Mr. Abrams: Mr. Mallory, would you remain a little bit, please? I may want to call you.

Mr. Mallory: Yes, sir.

Mr. Abrams: At this time, your Honor, I make the usual motion for a directed verdict.

The Court: Has the Government rested?

Mr. Hennessy: Yes.

The Court: I think you left several exhibits in abeyance.

Mr. Hennessy: Yes. I desire to offer in evidence at this time, may it please the Court, the tan suitcase, being Government's Exhibit 1 For Identification, and ask that it be marked in evidence; the cloth overnight bag heretofore marked as Government's Exhibit 2 For Identification; and also the cans of opium, being marked Government's Exhibit 8 For Identification, and the paper bag containing some opium, being marked Government's Exhibit 9 For Identification—I ask that all those exhibits be received in evidence and marked for the Government in evidence.

Mr. Abrams: I object to them as being incompetent, irrelevant and immaterial and not binding on the defendant. [127]

The Court: The objection is overruled. They will all be admitted in evidence.

Mr. Hennessy: May they be marked in evidence with the same numbers as they are marked for identification?

The Court: Yes.

(U. S. Exhibits 1, 2, 8 and 9 For Identification were received in evidence.)

(Testimony of George E. Mallory.)

Mr. Abrams: Do you close now?

Mr. Hennessy: Yes.

Mr. Abrams: I make the usual motion for a directed verdict.

The Court: Very well. The motion will be denied and an exception allowed.

Mr. Abrams: Before I make that motion—will you just hold that in abeyance? I neglected to—I want to recall Mr. Pocoroba for just a question or two on cross-examination. Do you have any objection, Mr. Hennessy?

Mr. Hennessy: No, I have no objection.

Mr. Abrams: Then I will make the motion later. Mr. Pocoroba, will you take the stand again, please?

TESTIMONY OF BENEDICT POCOROBA, recalled.

Further Cross-Examination

The witness testified further: As an agent I have the power of arrest. While I was in Santa Cruz I did not have the service gun, but I had a pocket gun. On Saturday night, August 12th, at about 11:30 or so, when I testified that Mr. Maugeri carried these two cartons, Government's Exhibits 3 and 4, into my cabin at the Miller Apartments, Mr. Barri and Mr. Tocco were in the apartment. I said that Mr. Maugeri brought in one carton [128] first and handed it to Mr. Tocco, and Mr. Tocco put it on the floor, and then Mr. Maugeri

(Testimony of Benedict Pocoroba.)

went out and in a few minutes came back with the other carton and handed it to Mr. Tocco, and Mr. Tocco put that on the floor. Then we had a drink, and Maugeri left. Maugeri was holding the box like this (indicating by holding both hands under bottom of box, with box against chest). That is my best recollection of how he was holding it; one box at a time. After Mr. Maugeri had left and after Tocco and Barri had emptied the contents of these boxes, both boxes had apparently been full of these cans that are in evidence. I do not know the exact weight of one of these cans. I am not a very good judge, but I would say better than a quarter of a pound. There are 95 cans, and divided so as 40 or 50 cans were in one of these boxes it would make the box rather heavy. This suitcase is pretty heavy here. This suitcase, referring to Government's Exhibit No. 1 in evidence, which is apparently loaded with these cans, is pretty heavy. At the time Maugeri was there he had a brown leather jacket on and dark trousers, tan shoes, and a brown hat. He was not wearing gloves. I didn't have any gloves in the house. I gave them a pair of socks to use. On Monday, August 14th, when the agents returned to Santa Cruz, I turned over to the agents the boxes and wrapping paper and that other paper, there, whatever was left in my house of those things. Between Sunday morning when Barri left and until Monday when I came back to my cabin and turned these things over to the agents, to my knowledge nobody was in my cabin. We had

(Testimony of Benedict Pocoroba.)

no maid service there. Everything was locked and I found it all intact, the same as when I had left. After the boxes and papers were turned over to Mr. McGuire I do not know whether an examination was made of the papers and the boxes for fingerprints. I was not present at any time when such an examination was made by the [129] chemist, and I don't know whether any such examination was made.

TESTIMONY OF GEORGE E. MALLORY,

recalled,

Further Cross-Examination

The witness testified further: I am one of the Federal chemists. Dr. Love is in charge of my office. Dr. Love is the chemist and I am associated with him. I did all the examination work of the narcotics here in question, myself. I made no examination of Government's Exhibits 3, 4, 5, and 6, respectively, for fingerprints. I had nothing whatsoever to do with any fingerprint work. I never have since I have been in San Francisco. In the Alcohol Tax Unit there is another photograph laboratory, and those men do that work. I do not know of my own knowledge whether such an examination was made there. To my knowledge, from the carbon on the outside of those boxes I would say that such an investigation had been undertaken. That is just pure guess work on my part.

TESTIMONY OF VANCE NEWMAN,

recalled,

Further Cross-Examination

"Mr. Abrams: Q. Mr. Newman, was an examination made of Government's Exhibits 3, 4, 5 and 6, the boxes, the paper and the wrapping paper and the Scotch tape there, for fingerprints?

A. You mean that gummed paper tape?

Q. The gummed paper tape.

A. Yes, it was examined for fingerprints.

Q. The boxes and the——

A. The two big cardboard boxes, the wrapping paper, and the gummed tape.

Q. Yes.

A. Yes, an examination was made for fingerprints. [130]

Mr. Abrams: Thank you. That is all.

Mr. Hennessy: Q. Any fingerprints found?

A. No, sir, negative results, sir.

Mr. Hennessy: That is all.

Mr. Abrams: That is all. Thank you, Mr. Newman.

Mr. Hennessy: The Government rests, your Honor.

I suppose you want to renew your motion?

The Court: It may be deemed to have been renewed and denied and an exception noted.

Mr. Abrams: Very well; thank you, your Honor."

TESTIMONY OF SALVATORE MAUGERI,

the defendant.

Salvatore Maugeri, the defendant, produced as a witness in his own behalf, having been first duly sworn, testified substantially as follows:

My name is Salvatore Maugeri. They call me Sam, more so than Salvatore. Sam is short for Salvatore. I really am known as Sam Maugeri. I am 53 next birthday. I am married and have three girls and a boy; four children. The three girls are aged 10, 20 and 21. I have a boy 22, who has been in the Navy five years. He is an enlisted man in the Navy, and has been in the South Pacific for 27 months. My wife and children are here in the courtroom and have been here all through the trial. In 1935 I was convicted of the charge of conspiracy in connection with counterfeiting. As a result of that I served a term of two years in the penitentiary. I came from prison in October, 1937, and went to Santa Cruz, California, and have lived there ever since with my family. I have been engaged partly as a gardener and partly as a concessionaire. I have my nephew engaged with me in the concession. Between my nephew and myself there are three concessions, all different games. I work in [131] one and my nephew worked in the other two, and my daughter helped me. In the winter time I would do the gardening work half a day in the morning and in the summertime most of the time was spent on the Boardwalk at the concessions. The hours of work in the summertime at the concession were

(Testimony of Salvatore Maugeri.)

usually from nine, nine-thirty, ten or eleven in the morning, until late at night, depending upon the crowds. Saturday and Sunday are the better days for business. My wife has a home in Santa Cruz. Her mother died and left a home for her. That is the home we live in now. It is an old residence, about a ten-room house, two stories high. Its value is about five thousand, I guess. I wouldn't know, because I am not a real estate man. The address is 32 Main street. Before that I had a kind of home and business, both, a greenhouse. I lost that when I went to jail on the counterfeit charge in 1937; I couldn't pay up.

"Mr. Hennessy: We object—incompetent, irrelevant, and immaterial, and has no bearing.

Mr. Abrams: Well, we are showing just a little bit of background, which I believe we have a right. I am practically all through now.

The Court: All right, go ahead."

The witness testified further: Of the automobiles mentioned in this case, the Oldsmobile belonged to my son, and I used it while he was in the service; all the family used it. The Chevrolet belongs to my nephew. It is, I believe, a 1936 car; I wouldn't say for sure. When my son came back from the South Pacific he saw the Oldsmobile run down, and he bought a little Pontiac for himself. He had a little money saved. He let me use the Oldsmobile. Living with me at the house at 32 Main Street are my brother and nephew and one Coastguardsman, who is a boarder, and my family. The Coastguardsman

(Testimony of Salvatore Maugeri.)

has been [132] there for a year or a year and a half, but my nephew and brother live there all the time since I have been at Santa Cruz, and before that here in San Francisco when I was here.

I know a man named Lagaipa. I don't recall the first time I met him, but it was in 1943 sometime. It was in the spring time, March or April; I wouldn't say. I met him on the Boardwalk in Santa Cruz.

"Q. Did he state to you his business at that time or why he was at the Boardwalk?

"Mr. Hennessy: We object to this on the ground it is irrelevant, incompetent and immaterial and hearsay.

Mr. Abrams: I think this is very pertinent, your Honor. This man Lagaipa is in this picture, very much so. We certainly have a right to show this man's association. They brought up the association of this defendant with Tocco and Barri, and it is true that I have to bring Lagaipa into this picture myself on cross-examination, but he is in the picture, and now we have a right for this man to explain his association with these men.

Mr. Hennessy: I don't think it is important. I will withdraw the objection.

The Court: I was going to say that. Strictly speaking, it is not competent, but I will let it go."

The witness testified further: He was looking for a business of his own, a concession in Santa Cruz. He said, "There is a lot of business here." I said, "There is a lot of business if you know how

(Testimony of Salvatore Maugeri.)

to run it." He found a little place that was supposed to be beer and sandwiches, serving food. He bought that, because I introduced him to the company in Santa Cruz, and he bought the place, but he never opened up. I don't know why. I didn't ask him the reason. He sold it before he opened up. [133] After that he opened up a saloon in Santa Cruz; a bar and a hotel upstairs, a small hotel. I patronized his place. I became friendly with him. He stayed at my house for, I would say, a couple of months. He was an Italian. He spoke Italian. He paid board and room, $12.50 a week, close to forty or forty-five dollars a month, because a lot of times he would bring home food, too. A lot of times he would eat outside. At our house he ate whatever the family ate, dinner and breakfast and lunch, anything. We became friendly, we went to shows. Occasionally we went to San Francisco together. My family went to the shows with him, the children. Later he brought his family to Santa Cruz. The family consisted of two girls and a boy and his wife. He lived in a hotel first, after the family came, and then after he sold his saloon, or gave it up; I think he sold it, and he bought a home for himself and family and lived in the home with his family there. My family and I visited his family and he and his family visited me and my family pretty often. We would go out together. I don't know about going to church together; I didn't go to church in the summertime. On the day his family came to San Francisco, or Oakland, and he went to get them, I

(Testimony of Salvatore Maugeri.)

took care of his bar. I did not know the man before he came to Santa Cruz, or know anything about him. All I know about the man other than that is what I have heard in court, here; that is all I know about him.

I met Mr. Tocco in Santa Cruz around November, I don't remember the date, 1943. I first met him at Lagaipa's saloon. Lagaipa introduced me to him as his friend. He told me he was from the East. I also met Mr. Lagaipa's brother-in-law; I don't know the name; they called him Jack, but I don't know the last name. I did not have much conversation with Tocco thereafter. The only thing he said, he tried to buy this saloon off Lagaipa. He said [134] he was coming in for that purpose; it wasn't my business. I didn't have much conversation. I don't know how long Tocco remained in Santa Cruz. He was at my house about a week. Then he went away. The second time I saw him in Santa Cruz was in March, 1944. Mr. Lagaipa brought him to my house and said if I have a room for him, and he said he had no room, and I know him before, so I said, "Yes." I let him stay at my house. He stayed there a couple of weeks. I did not charge him any rent. Tocco left again and came back to Santa Cruz the third time near July—I wouldn't say the day, but it was the beginning of July. I first saw him when he came to my house and inquired for Mr. Lagaipa. I hadn't seen Lagaipa for a long time and I told Tocco that. Tocco stopped at my place. He asked me to stay there. He stayed pretty

(Testimony of Salvatore Maugeri.)

near to the end of July. I understood his business at Santa Cruz was buying tomatoes and olive oil. Of course, I didn't ask him, it didn't interest me why he was there. By that time Tocco and I were friendly; my family was friendly with him, too. He went out with us. I took him to San Francisco occasionally. I went, myself, and I took him, too. We went to the show with him. He brought presents for the children. He was Italian and spoke Italian.

Concerning a man named Joe Barri, I know the name Joe, another Joe. I first met him about the first two weeks after Tocco came the first time. I saw the first and last time. That was around the end of July, 1944. Joe Tocco brought him, the other Joe, down to the Boardwalk, and introduced me to him. He said this man, he knows he was sick, kind of rheumatism, and he thinks sun baths will do him good. He says he was from the East, but I didn't ask what part of the East. He asked about staying at my house. I told him I didn't have much room, but if they were willing to sleep together they were welcome. They slept together [135] in the same bed. They stayed there together about two or three days, I guess. Then they went to the Santa Cruz Mountains and rented a cabin up there in the mountains. I went up there to visit them a couple of times, myself, and the family went a few times and visited them. They visited in my house, too, and we became rather friendly. We went to shows and went on trips together. On one occasion I took Tocco and Barri, the other Joe, to San Francisco,

(Testimony of Salvatore Maugeri.)

with some grips. That was once. I don't remember the date, but I remember now because I heard the date. I heard the testimony here about Wednesday, the 9th. I happened to be going to San Francisco that day to buy groceries for my family. I went once a month, or whenever we needed groceries, to San Francisco. We go down and get wholesale. I would go and buy merchandise for the concession, too. On this particular trip I knew that Tocco and Barri had to take the bus. I know transportation was kind of hard to get and they got to stand up. I told them, "If you boys wait until Wednesday," I said, "I take you down, because I have to go down." They said, "All right," they would wait. I took them to San Francisco. They had some grips with them. They put the grips in the back seat of the car. When we got to San Francisco the first place I stopped was at the olive oil place on Twenty-fourth and Howard, to order some oil. I stopped at Twenty-fourth and Howard, now Van Ness South. I ordered some oil, Italian oil. Then I went down to North Beach from there. I went to the bar of this man Scambellone. I have known him about thirty years, and at times I visit his bar in San Francisco; every time I go down to San Francisco. I have had drinks there and eat there. On this particular day I had a drink while I was there. I did not take Tocco in with me. I took the other Joe. They asked about leaving their grips there. They told me they would get [136] reservations to go back East. They say they can't get res-

(Testimony of Salvatore Maugeri.)

ervations, and if I have a friend to keep the suitcase until they get reservations. I say I got a friend, and I ask him if he was willing to keep the grips until they get the reservations. He was willing to do it. Then I stopped a taxicab there. I knew the driver before, for about twenty years. He took the grips to Scambellone's place. Then I went to buy my groceries. I stayed until five o'clock. Tocco and Barri say they have to go, as soon as they can get transportation, reservations, they go back East. I left Mr. Tocco off at Geary street; I don't know what ticket office, but the ticket office. I did not make another stop. After I left Joe there—I don't know the last name, I went to buy my groceries. I don't know the name of the street. It was up on Pacific; I went to Van Ness. Then I remember I got to buy spaghetti, and I went to the factory on Pacific, the macaroni factory. Then I go back to the Beach again. I saw Joe—of course, I don't know the last name. I told him good-bye; that is all, just a couple of drinks together and say "Good-bye." Then I went back to Santa Cruz at about five or five-thirty. I took my car and went back home.

I met Mr. Pocoroba at Santa Cruz. I don't remember when I first met him, but it was around May. I know him under the name of Vicari, Benny Vicari. He was walking and I was working, well, walk back and forth, and one morning he said, "Good morning," and I say, "Good morning." That was on the Boardwalk at my concession. All that time he stop and talk and I talk to him. I see him

(Testimony of Salvatore Maugeri.)

a couple of times a day and on occasions we talk together. Finally, one morning he asked me if I am Italian. I said, "Yes." He said so was he. I said, "I am glad to know you." I speak Italian. I asked him where he is from; he said he was from Philadelphia, Pennsylvania. From that time on I [137] saw him, not exactly every day, but two or three times a day or a week or more; I couldn't recall the number. I saw him during the day, and on the Boardwalk at the concession. After I first met him it was a couple of weeks, I think, before I had him over to my house. I invited him to my house. He had trouble eating. He said he was in an accident, had injured mouth or jaws. I said, "That's too bad, I feel sorry." He said, "I got a scratch in the leg." Sometimes I feel sorry because I see he has hard time eating, so I told him to come to my house anytime he wants. He came about twice or once a week, or three times a week. Sometimes he would bring chicken and rabbit and my wife would cook it for him, and he would eat his share. He went to shows with me and my family, and walks; not much walk, because I was working. He go to the Boardwalk with me. A couple of times I took him to San Francisco with me. I did not take him when I took Tocco or Barri. Well, I won't say; I don't remember. Once in a while my children called him "Uncle Benny." They played with him. He was a nice man. I got nothing against him. One day he talked to me about his income, how much he was getting a month. We would talk

(Testimony of Salvatore Maugeri.)

lots of times about money, how much we got, and everything. He said he got very nice income. We start talking, you know, and he said he got about $500 a month. I say, "You lucky." I said, "You got nothing to worry about." I said, "I wish I have that much myself, but I am not so lucky." Concerning the talk about narcotics, I don't know how it came up, but I think he did mention something about that, but I didn't pay no attention. I don't recall how it started, but he mentioned it; he said he had the good sense to save his money while he was young. I said, "You must have had lots of good business to make that much money." He said, yes, he had good business, he made good in business. I said, "All right," but I [138] didn't pay attention to the business, but occasionally he would come out and say he was doing some narcotic business, so I quit talking to him, because I don't like it, what he was talking about, but I didn't pay no attention. I guess he did ask several times if I could get narcotics for him, or knew where to get them, he had a good connection, but I don't recall how it started. I told him about the trouble that I had had once before. I told him I wouldn't have nothing to do with it, because I had trouble once, and that was once, and I had my family to take care of.

I did not know that Tocco and Barri and Lagaipa had anything to do with narcotics. I don't know anything about it. My family and I associated with them all the time. We would not have done that, we

(Testimony of Salvatore Maugeri.)

would not have had them come to our house if we had known they had anything to do with narcotics.

In the course of my conversations with Mr. Pocoroba, he did say something to me that he used to import the stuff, or bring it in from Germany. He said they have good connections in Europe and had a chance to bring it from over there. He said he had somebody paid on the boat. I think he did show me a letter from Chicago, one of the letters that are in evidence here. I don't know which letter it was. It was written in Italian, supposed to have been from some friend in Chicago; that's what he said. I read a couple of lines; I don't pay no attention. The letter talked something about paste, making paste. I think he told me about another letter from Chicago, but I don't recall what he said. He told me that he had a son in the Air Corps; he was an aviation instructor. Concerning the question of his son flying to Mexico, or Canada, he said they could. I don't know whether they could. He said he was flying to lots of parts of the country, Canada and Mexico. Concerning his son going to Mexico, [139] he said he has a chance to go if he had to go. I didn't say anything about that. He asked me if I know anybody, if I got somebody to trust to go to Mexico to get the stuff. I say no. He has the friend, he could go himself if he wants to. I told him I had nothing to do with it. I said, "I know nothing about it, I don't want nothing to do with it." He never mentioned my boy in the service. He said he came here from El Paso, Texas. I never used the term

(Testimony of Salvatore Maugeri.)

"mud." I don't even know what it is. I don't remember the word "paste" used in Italian. Tomato paste is what we use for cooking. I mean the word "conserve." We talked about narcotics just once in a while, but I never discussed it. He mentioned it a few times, but not much. We never talked any more, because I had nothing to do with it. He wouldn't talk to me any more about it; there was no more conversation about it for a long time, until about an hour and a half or two hours prior to the arrest.

After I returned to Santa Cruz from San Francisco after having taken Tocco and Barri up there I later saw them again in Santa Cruz. It was one night, I don't recall if it was Friday or Thursday, I wouldn't say for sure. One, not both. I also saw Pocoroba again in Santa Cruz after I came back from San Francisco. I asked Pocoroba if the boys, meaning Tocco and Barri, could stay in his cabin. I asked Pocoroba, myself. I had a phone call from Tocco. He called me, I think it was Thursday night, or Friday morning, something like that, because I was busy working. He said he missed the other Joe, and he was worrying about what happened to him. I said, "I haven't seen him." He said, "If you see him tell him to call me, too." I told Pocoroba that I had received such a call, and if he saw Joe Barri to let Tocco know about it. Tocco did not say he was coming back to Santa Cruz. Later I saw Tocco in Santa Cruz. I saw him at [140] Benny's house, Mr. Vicari. I saw both Tocco

(Testimony of Salvatore Maugeri.)

and Barri there on Saturday evening. I don't know the date, but I think Saturday, I know. I did not hear any conversation at that time about narcotics, nor did I have any talk with Joe, or Joe Barri, or Joe Tocco, about narcotics of any kind. I was in the house there about five or ten minutes. I had a drink. On that day, just prior to that time, Pocoroba came to me at the Boardwalk and asked me to telephone to the bar up there in San Francisco. He said that Joe wants me to call in San Francisco to find that Joe and tell Joe to come back to Santa Cruz. That was before Tocco came back to Santa Cruz that Pocoroba came over to my concession. He told me the other Joe wants me to call up in San Francisco and tell Joe Tocco to come back to Santa Cruz, to call him some place, he didn't state where. I told Pocoroba, I give the phone number, this place where it was, Scambellone. I says, "Here is the phone number, tell Joe to call him." I said, "I am working, I can't leave work." I give the phone number to call and tell him to talk to Joe. I was too busy; I had no time. It was Saturday night. I gave the phone number to Mr. Pocoroba and said for Joe to do that, himself, if he wants to.

"Q. On Saturday evening, August 12th, I will ask you if all of that Saturday you were working at your concession.

A. Well, except when I went to eat.

Q. Did you go to this cabin Saturday night?

A. Yes.

(Testimony of Salvatore Maugeri.)

Q. About what time was it?

A. Oh, after 11:00, 11:30; I don't recall what time it was.

Q. You went there as you are accustomed to go frequently to have a drink? A. Yes.

Q. You were there, and you had a drink?

A. Yes.

Q. What did you see there?

A. I saw both Joes there.

Q. You saw both Joes there. What were they doing when you [141] got to the cabin?

A. Both outside in the passageway.

Q. What were they doing?

A. I don't know what they were doing; they weren't doing nothing.

Q. Did they say anything?

A. They had some kind of box, but I don't know what it was.

Q. Box of some sort? A. Yes.

Q. Did you pay any attention to it?

A. No.

Q. You went in? A. I went in.

Q. Did they go in? A. Yes.

Q. All three of you? A. Yes.

Q. Did you have a drink? A. Yes.

Q. How long did you stay?

A. About six, not more than ten minutes.

Q. Then you left? A. Yes.

Q. Where did you go? A. Back to work.

Q. To the concession? A. Yes.

Q. What time did you leave the concession?

(Testimony of Salvatore Maugeri.)

A. Around quarter to two, or fifteen minutes, twenty minutes, something like that.

Q. Then where did you go? A. Home.

Q. To your home? A. Yes.

Q. Did you go to bed? A. Yes.

Q. The following Sunday morning what did you do, August 13th? Did you get up?

A. About 7:00 or 7:30.

Q. Where did you go?

A. Went down to the Boardwalk again.

Q. Went down to the Boardwalk again?

A. Yes.

Q. To your concession? A. Yes.

Q. What for? A. To stock my shelves.

Q. How long did you stay there?

A. About an hour or an hour and a half.

Q. Tell me, did you go back home?

A. Yes. [142]

Q. How? A. In the car.

Q. What kind of a car? A. Chevrolet.

Q. You drove in? A. Yes.

Q. What time do you think it was when you got home?

A. I couldn't say the time; it was around 9:00 o'clock; 9:15.

Q. Sometime around 9:00 o'clock?

A. It was a little after 9:00.

Q. What did you do when you got home?

A. I had my breakfast and read the paper.

Q. Was your wife home? A. No.

Q. Where was she? A. At church.

(Testimony of Salvatore Maugeri.)

Q. She had not come from church yet?

A. No.

Q. How long did you stay home?

A. About 11:30; I mean 10:30.

Q. Then where did you go?

A. I went back to work about twenty minutes to eleven.

Q. Back to the concession? A. Yes.

Q. On that day did you see Mr. Pocoroba?

A. Sunday?

Q. Yes. A. Yes.

Q. What?

A. Yes. I meet him when I went to work; I meet him outside.

Q. Did you then talk to him?

A. Yes, I said, "Good morning."

Q. On the following Monday did you see Pocoroba? A. No.

Q. Tuesday? A. No.

Q. Wednesday?

A. Wednesday, yes; Wednesday evening.

Q. Were you arrested Wednesday?

A. Yes.

Q. Where? A. My home.

Q. When you had come from work at the Boardwalk? A. Yes.

Q. Did you see Pocoroba?

A. Shortly before.

Q. Where? A. In the concession.

Q. Did you have a conversation with him?

A. Yes. [143]

(Testimony of Salvatore Maugeri.)

"Q. What did he say?

A. I don't recall what he said. He said he wants ten cans of dope and he said to me he wants to take ten cans of dope, to help him. I said, 'I don't need no help, I got no dope.'

Q. He asked you if you could get it for him?

A. Yes.

Q. What did you tell him?

A. I said, 'I haven't got it.'

Q. What else did you tell him?

A. That is all. He said, 'Forget about it.'

Q. Then you were arrested?

A. Around six o'clock, quarter to six I went home and as soon as I stepped out of my car, not my car, but my nephew's, the officers were there, they all jumped me and put me under arrest.

Q. Put you under arrest. When you left Saturday night—when you had a drink in Pocoroba's cabin and left to go back to work— A. Yes.

Q. Did you say anything?

A. I said, 'Maybe I see you boys tomorrow.'

Q. Then you left? A. Yes.

Q. Did you knock on Pocoroba's cabin at 3:00 or 3:30 the next morning, Sunday morning?

A. No.

Q. Where were you at that time?

A. Asleep, in bed.

Q. You were home in bed with your family?

A. Yes.

Q. Did you tell Pocoroba that you drove Tocco to Berkeley? A. No.

(Testimony of Salvatore Maugeri.)

Q. Did you drive him to Berkeley?

A. No.

Mr. Abrams: That is all."

Cross-Examination

I don't know when Tocco left Santa Cruz. The last time I saw him was just before eleven, a little after eleven, Saturday night, in Pocoroba's house, in the cabin. I went to the cabin at that time, quarter after eleven, to have a drink [144] with him. I walked up from the concession; it is not far, it is about a block, not even a block. I saw Pocoroba, Joe Tocco and Joe Barri in the cabin. Nobody else was there. Pocoroba was there. They had the boxes. I didn't pay much attention. I went in before the boxes were brought in. Joe Tocco and the other Joe brought the boxes in. I guess each one of them had a box. I didn't pay much attention to where they carried the boxes. I went out there and they give me a drink and that is all I know. I wasn't interested in the boxes. When Joe Tocco came in the cabin with a box I never paid no attention, I don't know what he did with it. When Joe Barri came in with a box I don't know what he did with it. The box you show me, Government's Exhibit 3, resembles the box I saw. It is about the same size. It had a paper on the top. It was covered. I never asked them what was in the box. I remained in the cabin that night not more than ten minutes; just enough to have a drink and go back to work. My daughter took care of the concession

(Testimony of Salvatore Maugeri.)

while I was away. I did not have any conversation with Pocoroba while I was in the cabin; just had a drink. I did not have any conversation with Tocco. Tocco did not tell me that he was going to leave in the morning. Barri did not tell me he was going to leave in the morning.

I first met Lagaipa in Santa Cruz in 1943 on the Boardwalk. I had not known him prior to that time. I had never lived in New York. I know nothing about Lagaipa's previous record. He lived at my house during a period of time, a little over two months. He paid rent while he was at my house. He was not engaged in business, he was looking. Later he bought a concession, a beer concession, but he didn't open it, and then a bar. The name of the bar was "Red Devil Inn." I last saw Lagaipa the beginning of June. I don't know if he had a criminal record. [145]

I first met Joe Tocco in November, 1943, in Lagaipa's place. He was introduced to me by Lagaipa under the name of Joe Tocco. I did not have a conversation with Tocco at that time, just "Hello." I think his reason for being in Santa Cruz was that he came to buy Lagaipa's place. He did not live at my house during that visit in November, 1943.

I next saw Joe Tocco in the spring, March or April, I think it was, 1944, at Lagaipa's house, with Lagaipa. The conversation I had with him at that time was if I had a place for him to sleep, because Lagaipa had no place at his house. I said, "Yes." He stayed at my house quite a bit. He did not pay

(Testimony of Salvatore Maugeri.)

rent. He was a friend. You know, I figured they bring the presents to the kids and, naturally—he hardly ate anything, just slept mostly. I charged Lagaipa rent. He stayed two months. I did not charge Tocco anything. I think I did charge him the first time, yes; I recall I did. I think $12 or something like that. He stayed a couple of weeks or a month. I don't know what he was doing in Santa Cruz when he visited me in March, 1944. He was stopping at my house. I do not know that he had any business. He said he was a commercial buyer of oil and whatever he can get, that is what he came to Santa Cruz for, to buy things in California. He came to Santa Cruz and stayed a month in March of 1944 to see Lagaipa. Lagaipa had a house, but no room for him to sleep in. He stayed with me. When he left in March he did not tell me where he was going.

I next saw Tocco in July of 1944. He came direct to my house. He said he was looking for Lagaipa. I did not see Lagaipa at that time. At that time he did not tell me what business he was in. He did not tell me why he came to Santa Cruz again. In March it wasn't still cold in Santa Cruz; it was warm; it was before the outdoor season. My concession is open pretty near [146] all year around. When Tocco came to Santa Cruz in July he lived in my house. I did not charge him any rent this time. He said the business he was engaged in in the East was a fisherman, a wholesale fish—he had a fish store in New York. He said his folks, that is what he

(Testimony of Salvatore Maugeri.)

was talking about. In one way it did seem strange to me that he was making those frequent visits to a place like Santa Cruz, but the man said he bought merchandise, oil, or tomatoes, or whatever he can get. I didn't pay much attention.

I first met Joe Barri close to the end of July on the Boardwalk. I met him through Tocco. Tocco introduced him to me. He said he was a friend of his. He introduced him to me under the name of Joe; just Joe. He didn't tell me his last name. He did not tell me where he came from. He said he was sick with rheumatism, wanted to get sun baths on the beach; that is what he was doing in Santa Cruz. At that time Barri stayed a couple of days at my house. Before meeting him he had not been up to my house. He went to my house that night. We went together. I did not ask him to go up to my house. Joe Tocco asked me if there was a place for him, too. He met me at the concession, and we went up to my house together. I don't recall whether he had luggage. I think he had luggage; some luggage, some suitcase. I couldn't tell you the kind of a suitcase. It was around about July 6th when Tocco came to my house, the last trip: I wouldn't know the date. He came direct to my house from the station and he had one suitcase, like that, when he came to my house (referring to Government's Exhibit 1). I don't know if it was this, but one like it, pretty close to the same color. I would not say the same size, as I didn't measure it. He had a little cloth overnight bag, whatever

(Testimony of Salvatore Maugeri.)

they call it, also. Those men left my house at the end of July and went up to Felton for a couple of [147] weeks. They then returned to my house on a Sunday. I saw the bags they had when they came back from Felton. They were the same bags. Barri had one bag, I think. Tocco had one, and the little bag. The big one and the little one. Tocco carried the tan bag. Those men returned to my house from Felton on a Sunday morning and they remained until August 9th; two or three nights they slept there. On August 9th I drove them to San Francisco and to Scambellone's saloon, operated by a friend of mine, Pete Scambellone. I conversed with Scambellone about the suitcase because they asked me to find somebody to keep them; both Joes asked me. They both asked if I know any place they could keep the suitcase until they completed the reservations. I told them I would try. That conversation occurred on the way to San Francisco, when we arrived in San Francisco, up at Scambellone's. When we were coming down and one Joe stopped to go down to the ticket office to find the reservation, and I drove the other Joe to North Beach. The conversation I had with Joe Barri about the conversation occurred when we were coming down, arriving in San Francisco, going right along the street. I don't even know the streets. That was before Joe Tocco left to go to the ticket office. They did not know whether they would get the reservations, or not. They asked me to find some place to leave the suitcase. The suitcases were

(Testimony of Salvatore Maugeri.)

then in the back of my car. I saw the suitcases. I left them in the car. I did not lift them up at all. I don't know if there was anything in the suitcases. I don't know if that big suitcase was empty at the time. Then the taxidriver took them to Scambellone's house. Later I went to Scambellone's house that day. That was about eleven o'clock, before noon, that I arrived there. I did not see the suitcases then. I was not up at Scambellone's house after the suitcases had been brought into the house. I [148] left for Santa Cruz about 5:30 or quarter to six and arrived in Santa Cruz that same evening. I left Tocco and Barri in San Francisco. I was at my concession on the following day, Thursday. I saw Mr. Pocoroba on the Boardwalk. I couldn't say what time it was. I did not have a conversation with him about the two Joes using his cabin on that day, Thursday. That conversation occurred the next day, Friday. I just tried to do my best—I couldn't remember every word that was said when we were talking—we forget what we were talking about. I just stated a little while ago that Joe Tocco, he called me up and was worried about missing the other Joe, and asked me if I seen him, and I said, "No, I don't." Concerning the conversation about using Pocoroba's cabin, I say, "In case Joe come back I got no place at my house; a friend of mine and his family comes from San Francisco and I have no room." I said, "If he comes back have you room for him?" And he said, "Yes." That conversation occurred on Friday.

(Testimony of Salvatore Maugeri.)

"Q. Had you seen Barri yet?

A. On the night.

Q. Had you seen Joe Barri?

A. Yes, in the evening later.

Q. What evening? Friday or Thursday?

A. Friday.

Q. As a matter of fact, you had seen Joe Barri the previous evening, Thursday evening, hadn't you?

A. No, Thursday—I wouldn't know—I just stated before, because I don't remember whether it was Thursday or Friday.

Q. Isn't it a fact you returned from San Francisco on Wednesday night?

A. Yes, Wednesday night.

Q. And that Joe Barri returned Thursday night, and that Tocco didn't return until Friday night; isn't that the fact? A. I don't remember."

The witness testified further: I did not have room in my house to permit the two Joes to stay there, because a family [149] from San Francisco wanted to stay the weekend. I have about ten rooms in my house, but they are not all bedrooms. There is the front room, the dining room and kitchen and everything. We have four or five bedrooms. I have a big family, myself. We all have a room. My brother and my nephew live there beside my family. My brother's name is Vincenzo. We call him Jim for Vincenzo. He is in business with my nephew in the concession. He does not have an automobile. My nephew lives there, also. His name is Dominic. He has an automobile. It is a Chev-

(Testimony of Salvatore Maugeri.)

rolet coupe. Once in a while I drive that car, myself. That car is kept in the garage at my house. There is also a Coastguardsman who lives there. He has a room. My son owns the Oldsmobile. My son is in the service. I have been driving that car for many months and that car is also kept there. There is also a Pontiac automobile kept there that belongs to my boy. I think I have driven that once or twice.

"Q. When did you first meet Benedict Pocoroba?

A. In the spring; I don't recall the date.

Q. You and he became pretty friendly, did you?

A. Yes, sir.

Q. And how long had you known him before the subject of dealing in narcotics was brought up?

A. Oh, it was a long time.

Q. Well, about how long?

A. I couldn't remember.

Q. Do you remember where the conversation took place?

A. All the conversation was on the Boardwalk.

Q. On the Boardwalk? A. Yes, sir.

Q. Well, he visited you at your home, didn't he?

A. Yes, sir.

Q. And you drove him back from your house to his cabin, didn't you, in your automobile?

A. Once in a while.

Q. And you had conversations while driving in the automobile, didn't you? A. No, sir.

Q. Never talked while you were in the automobile? [150] A. No, not narcotics.

Q. Now, what is your best recollection as to

(Testimony of Salvatore Maugeri.)

when you first discussed narcotics with Pocoroba?

A. Oh, I couldn't say, because he mentioned a lot of things a lot of times, and I didn't pay no attention.

Q. You weren't interested at all in narcotics?

A. No, sir.

Q. And you told him at that time you had been convicted of counterfeiting and served two years in the penitentiary?

A. Yes, on one occasion I did.

Q. And did you use the expression that dealing in counterfeit was a lousy business?

A. No, I said I got a bum deal.

Q. You said you had a bum deal? A. Yes.

Q. You never told him you didn't intend to have anything to do with counterfeiting any more?

A. No, I haven't got anything to do with anything.

Q. You told him you were willing to take a chance dealing in narcotics for ten or twenty thousand dollars but not for a few hundred?

A. Never mentioned anything.

Q. Did he tell you—did you ask him if he had any contacts in Chicago, and he said he might?

A. No, sir.

Q. And did you the following day ask him to write a letter to Chicago? A. No, sir.

Q. Then about a week later did he show you a letter?

A. He showed me a letter once, but I don't know when.

(Testimony of Salvatore Maugeri.)

Q. Do you know how he happened to show that letter? A. Yes.

Q. How?

A. We was talking, and he said he had a letter and wanted to get narcotics for his friend.

Q. Previously you hadn't discussed with him at all his writing to Chicago? A. No.

Q. And without any previous conversation concerning any writing to Chicago he produced a letter and showed it to you? [151]

A. He might have said something before, but I paid no attention to him.

Q. Did he tell you at that time that his friend wanted to buy ten cans of opium for $150 a can or some such price? A. No, sir.

Q. And did you say to him that you wouldn't be interested, that you would be willing to sell opium in 50-can lots for $225 a can?

A. I never say such a word. I wasn't interested in dope at all.

Q. Did you ever discuss with Mr. Pocoroba the matter of his son who was an aviator in the United States Army bringing in opium from Mexico?

A. No.

Q. Was that subject ever discussed between you two?

A. No. He mentioned it once, he can get—just the way I stated it a little while ago.

Q. What did he say?

A. If he could trust somebody, he has the son who can fly.

(Testimony of Salvatore Maugeri.)

Q. If he can trust somebody?

A. Yes, if he can trust somebody to get it.

Q. What did you say?

A. 'There is nobody else you can trust more than yourself and the son.'

Q. You didn't visit Pocoroba's cabin very often, did you? A. Oh, yes.

Q. About how often?

A. Sometimes twice a day, sometimes once, any time I had a chance.

Q. Why did you go there so often?

A. We were all together, just passing the time together. He stayed at my concession, and I go down to have a drink a lot of times.

Q. When you left the cabin on the evening of Saturday, August 12, after eleven o'clock, where were those two cardboard boxes?

A. I don't know. [152]

Q. Did you see them?

A. I don't pay no attention.

Q. Didn't see them in the cabin?

A. Yes, they brought them in, but I didn't see where they put them.

Q. You weren't curious as to what they contained? A. It was not my business.

Q. Did you see the suitcases?

A. No, I didn't.

Q. Didn't see that suitcase in the cabin?

A. No.

Q. Did you see the other cloth bag?

A. No, I didn't see it.

(Testimony of Salvatore Maugeri.)

Q. You referred to the reference, to a word 'paste' in one of the letters. Did you know what that meant?

A. No, I don't. I thought it was conserve or paste the way we have it.

Q. Do you know what the expression 'mud' meant? A. I never heard of it.

Q. Have you ever been convicted of a violation of the State poison law? A. Poison?

Q. Poison, the State poison law.

A. I don't know what it is.

Q. Have you ever been convicted, I am asking you, on a charge of violating the California State poison law.

A. I have never been convicted except once, the counterfeit conspiracy; that is all.

"Mr. Hennessy: I think that is all.

Mr. Abrams: That is all.

The Court: Just one question. I am a little bit confused.

Q. You were arrested on the 16th, was that the day, the 16th of August?

A. The 16th of August.

Q. Now, how long a period of time was there between the time that you first talked with Mr. Pocoroba about narcotics——

A. About an hour and a half.

Q. Wait, listen. How long a period of time was there from the time you first talked with Mr. Pocoroba, in weeks or [153] months, how long a period was that? A. I couldn't recall, sir.

(Testimony of Salvatore Maugeri.)

Q. About when was that that you first talked with him about the narcotics on the Boardwalk?

A. He mentioned that quite a few times.

Q. About when was the first time that happened?

A. I couldn't remember.

Q. About how long after you met him?

A. Oh, about a month or more.

Q. You met him first when?

A. In May sometime.

Q. So it was sometime in June when he first talked to you about narcotics?

A. Just about, but I couldn't recall the day.

Q. Is this a fair and correct statement; that it was sometime during the month of June, if it was a month afterwards?

A. Just about that. I couldn't say the date, you know.

The Court: Any other questions of the witness, gentlemen?

Mr. Hennessy: Now further questions.

Mr. Abrams: No questions.

The Court: The witness may be excused.

Mr. Abrams: The defense rests.

The Court: Has the plaintiff any rebuttal?

Mr. Hennessy: No, we have no rebuttal.

Mr. Abrams: I want to consider some additional evidence by stipulation.

Mr. Hennessy: I have no objection.

Mr. Abrams: I forgot to ask the agents or Mr. Maugeri when they were on the stand about searching the premises, and I think it can be stipulated

rather than putting them back on the stand, that following Mr. Maugeri's arrest on August 16th his house was searched by the agents, and also [154] his safe deposit box.

Mr. Hennessy: I was advised by Major Manning that there was no safe deposit box. The house was searched with his consent but no narcotics found.

Mr. Abrams: Also a safe in the house?

Mr. Hennessy: Major Manning believes there was.

Mr. Abrams: Also a safe in the house, and his house was searched, and no narcotics were found.

The Court: Let the record show that the jurors are present when the stipulation was made.

Mr. Hennessy: Yes."

[Endorsed]: Lodged Feb. 2, 1945.

[Endorsed]: Filed Feb. 2, 1945.

[Title of District Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS

Pursuant to stipulation of counsel, it is hereby ordered that that certain document of one hundred thirty pages, lodged with the Clerk of this Court on February 2nd 1945, entitled Bill of Exceptions, of the defendant Salvatore Maugeri may be and the same is hereby considered to truthfully set forth the proceedings had upon the trial of the defendant Salvatore Maugeri and that it contains in narrative form all of the testimony taken upon the trial together with all of the objections made by

said defendant and the rulings thereon and the exceptions noted by said defendant and it may be and is hereby settled, allowed, certified and approved as the Bill of Exceptions in the above entitled matter;

And it is further ordered that the Clerk of said Court file the same as a record in said case and transmit it to the Honorable Circuit Court of Appeals for the Ninth Circuit.

Dated: February 2nd, 1945.

LOUIS E. GOODMAN
United States District Judge.

[Endorsed]: Filed Feb. 2, 1945. [156]

[Title of District Court and Cause.]

ADDITIONAL AND AMENDED ASSIGNMENT OF ERRORS. STIPULATION AND ORDER

Comes now Salvatore Maugeri, defendant above named, and hereby amends his assignment of errors heretofore filed in connection with his appeal herein by adding thereto the following exceptions and assignment of errors:

10. That the trial court erred in rendering judgment on each of the verdicts of guilty, finding defendant guilty on both counts one and two of the indictment, in that said counts of said indictment state facts constituting but one offense.

11. That the trial court erred in ordering the

sentences, pronounced by the court in rendering judgment on counts one and two of the indictment, to run consecutively in that said counts of said indictment state but one and the same offense.

12. That the pronouncement of judgment upon both the verdicts finding defendant guilty on both counts of the indictment [157] and ordering said sentences to run consecutively, constitutes a violation of the double jeopardy clause of the Fifth Amendment to the Constitution of the United States in that the facts stated in counts one and two of said indictment constitute a statement of but one and the same offense.

Dated: January 31, 1945.

SOL A. ABRAMS
Attorney for Defendant

STIPULATION

It is hereby stipulated that the foregoing additional and amended assignment of errors may be filed in the above cause and appeal with like force and effect as if said additional assignment of errors were contained in the original assignment of errors filed by said defendant and appellant and that the above entitled court may make its order to such effect.

Dated: January 31, 1945.

FRANK J. HENNESSY
United States Attorney
SOL A. ABRAMS
Attorney for Defendant

ORDER

On reading and filing the foregoing stipulation and good cause appearing therefor, it is hereby ordered that the foregoing additional and amendment assignment of errors of defendant be filed herein with like force and effect as if said additional assignment of errors had been included in the original assignment of errors filed by defendant Salvatore Maugeri in support of his appeal herein. It is further ordered that the Clerk of the above court include said amended and additional assignment of errors with the record and proceedings and forward the same to the Appellate Court pursuant to Rule 8 of the Rules of Practice and Procedure after plea of guilty.

Dated: February 2nd, 1945.

LOUIS E. GOODMAN
District Judge

[Endorsed]: Filed Feb. 2, 1945. [158]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 158 pages, numbered from 1 to 158, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of The United

in support of appellant's position, appellant believes it necessary to print the entire record.

Dated: February 2nd, 1945.

LEO R. FRIEDMAN
SOL A. ABRAMS
Attorneys for Appellant

Receipt of a copy of the within Statement is hereby acknowledged this 2nd day of February, 1945.

FRANK J. HENNESSY
United States Attorney

[Endorsed]: Filed Feb. 15, 1945. Paul P. O'Brien, Clerk.

No. 10,939

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SALVATORE MAUGERI,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

LEO R. FRIEDMAN,
Russ Building, San Francisco 4,
SOL A. ABRAMS,
Kohl Building, San Francisco 4,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

No. 10,939

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SALVATORE MAUGERI,	*Appellant,*
VS.	
UNITED STATES OF AMERICA,	*Appellee.*

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction by the Southern Division of the United States District Court for the Northern District of California. The offenses charged in the indictment are violations of the Jones-Miller Act, 21 U.S.C. 174 and are punishable by imprisonment for a term exceeding one year. This Court has jurisdiction under the provisions of 28 United States Code, Section 225, subdivision (a), First and Third and subdivision (d).

OFFENSES CHARGED, PLEA AND OUTCOME.

Appellant was charged in an indictment, jointly with two other defendants, Joseph Tocco and Joseph

Barri, in two counts, with violations of the Jones-Miller Act, to-wit: (1) the unlawful concealment and facilitating the concealment of opium and (2) facilitating the transportation of the same opium (T. R. 2). Only appellant had a trial by jury, defendant Tocco having entered a plea of guilty to one count of the indictment, and the defendant Barri being a fugitive. Upon the trial appellant was found guilty on both counts of the indictment (T. R. 11). Motions in arrest of judgment (T. R. 13) and for a new trial (T. R. 15) were denied (T. R. 17); whereupon appellant was sentenced to imprisonment for a term of ten years and to pay a fine of $5000 *on each count of the indictment, the sentences to run consecutively* (T. R. 17, 18). Appellant filed his notice of appeal (T. R. 18), supported by grounds of appeal (T. R. 20) followed by assignment of errors (T. R. 22) and additional and amended assignment of errors (T. R. 189).

STATEMENT OF FACTS.

Substantially, the facts of the case are:

Appellant, 53 years of age, lived in Santa Cruz, California, a beach resort, with his wife and four children, three girls ages 10, 20 and 21, and a boy 22 for the past five years an enlisted man in the U. S. Navy. Appellant had established his home in Santa Cruz following his release from a Federal prison in October, 1937, having served two years on a charge of conspiracy in connection with counterfeiting. He was occupied as a gardener and a concessionaire on

the board walk at the beach. He and his nephew operated three game concessions. In the winter time appellant did gardening work and in the summer time busied himself with his board walk concession (T. R. 158). The hours of work at the concession were usually from 9 in the morning until late at night, depending upon the crowds (T. R. 47). Appellant and his family resided in an old ten-room house valued at about $5000 owned by appellant's wife and left to her by her deceased mother. Appellant's son owned an Oldsmobile automobile and his nephew a 1936 Chevrolet automobile. On his return from the South Pacific the son purchased for himself a Pontiac automobile and permitted appellant, his father, to use the Oldsmobile automobile which was run down. Besides his family, appellant's brother, nephew and a Coast Guardsman lived and boarded at his home (T. R. 159), the Coast Guardsman having lived there for a year and a half and the brother and nephew during the entire time appellant lived in Santa Cruz (T. R. 160).

Appellant first met a man named Lagaipa about March or April of 1943 on the board walk in Santa Cruz. Lagaipa was looking for a concession for himself (T. R. 160) and bought a place serving food, beer and sandwiches; however, he sold the business before opening it up and later opened up a saloon and small hotel in Santa Cruz. Appellant patronized Lagaipa's business and so became friendly with him. Lagaipa stayed at appellant's house for a couple of months, ate there frequently and paid $12.50 a week for board and room. Both appellant and Lagaipa were of Italian

descent and spoke Italian. Appellant and Lagaipa became quite friendly, going out together, to shows together, and traveling occasionally to San Francisco together. Members of appellant's family also went out and to shows with Lagaipa. Subsequently Lagaipa brought his family, consisting of his wife and three children, to Santa Cruz, whereupon Lagaipa lived with his family, at first in a hotel and later in a home he purchased; the two families frequently exchanged visits. On the day that Lagaipa's family arrived from the east, appellant tended Lagaipa's bar for him so that Lagaipa could go to meet them (T. R. 161). Appellant did not know Lagaipa or anything about him prior to his coming to Santa Cruz (T. R. 162).

Appellant first met the co-defendant Tocco in Santa Cruz around November, 1943, at Lagaipa's saloon, having been introduced to him by Lagaipa who represented Tocco to be his friend from the east. At the same time appellant was introduced to Lagaipa's brother-in-law. Tocco was apparently trying to buy Lagaipa's saloon and had come there for that purpose. Tocco lived at appellant's house for about a week and departed, returning to Santa Cruz in March, 1944, at which time Lagaipa brought him to appellant's house seeking a room for him. Appellant provided a room for him and Tocco remained a couple of weeks without charge and left, returning to Santa Cruz a third time near July, 1944. He came to appellant's house inquiring for Lagaipa. Appellant informed Tocco that he had not seen Lagaipa for a long time (T. R. 162).

Lagaipa dropped out of sight the end of May or the first of June (T. R. 48-134) and hasn't been heard of since.

Tocco again stayed at appellant's house until about the end of July. Appellant understood his business at Santa Cruz to be that of buying tomatoes and olive oil. By this time Tocco had become friendly with appellant and his family and they frequently went out together. Tocco also was of Italian descent and spoke Italian.

Appellant first met the co-defendant Barri around the end of July, 1944, having been introduced to him by Tocco on the Boardwalk. Tocco represented to appellant that Barri was sick with rheumatism and required sun baths, also that he was from the east. Tocco requested sleeping accommodations for Barri at appellant's house, and appellant permitted him to sleep with Tocco. In this manner Tocco and Barri remained at appellant's house for about two or three days, after which they rented a cabin in the Santa Cruz Mountains. Appellant and his family visited them there a few times and continued friendly relations with them (T. R. 163). On one occasion appellant drove Tocco and Barri to San Francisco with some grips. Appellant happened to be going to San Francisco to buy groceries for the family, usually going to San Francisco about once a month for said purpose and also to obtain merchandise for his concession. Just prior to this particular trip appellant was advised that Tocco and Barri intended taking a bus to San Francisco and suggested that if they waited

until Wednesday he would then be going to San Francisco and would take them there with him (T. R. 164).

Federal narcotic agents took up residence in Santa Cruz as early as March, 1944, for the purpose of carrying on an investigation of the activities of certain persons suspected of dealing in narcotics. Appellant was kept under surveillance by the agents (T. R. 121 and 133, 134). Lagaipa was under surveillance by the agents from and during the time he left New York, arrived in Santa Cruz and remained there. Tocco and Barri were also kept under surveillance (T. R. 134).

Benedict Pocoroba, a federal narcotic undercover agent, residing in Chicago, Illinois, arrived in Santa Cruz, California on May 1, 1944, pursuant to orders of superiors in the Bureau of Narcotics (T. R. 25). He was transferred to Santa Cruz to do undercover work in connection with the investigation being carried on there by the Federal Narcotic Division. There he met other federal narcotic agents. Assuming and using the name of Benedict or Benny Vicari, to cover up his real identity, Pocoroba commenced his work. Being of Italian descent and speaking Italian Pocoroba was ideally suited for the task (T. R. 42).

Shortly after arriving in San Francisco, en route to Santa Cruz on his new assignment, Pocoroba was advised of the activities of Lagaipa who recently arrived in Santa Cruz from New York and was known to have trafficked in narcotics in New York for a long period of time. He was also told about Tocco, who likewise was from New York. Pocoroba was informed that Lagaipa was then living in Santa Cruz and was ac-

quainted with appellant and had received his mail at appellant's house, and also that Tocco was acquainted with appellant (T. R. 42). Lagaipa was known to have a long criminal record in New York involving narcotics. Pocoroba announced his purpose, in going to Santa Cruz as undercover agent, was to conduct an investigation of people who were under suspicion of trafficking in narcotics and to make purchases of narcotics from suspects if possible.

On arriving in Santa Cruz, Pocoroba registered at the Greystone Hotel under the assumed name of Vicari and from that time on was known to everybody he contacted by that name. On being advised that appellant had a concession on the board walk, Pocoroba went there to look for him. At that time Pocoroba knew that Lagaipa was in Santa Cruz and that he and appellant were friendly (T. R. 44, 45).

Pocoroba first met appellant at his concession on the board walk on May 7, 1944 (T. R. 26, 45). He went to appellant's concession for the purpose of striking up a conversation and becoming acquainted with him and to work into his confidence. He had along with him his son (T. R. 45) an instructor pilot in the Air Force (T. R. 51) and some of his son's fellow officers (T. R. 45) who played the games at appellant's concession. His son and fellow officers made a special trip to Santa Cruz from Merced, California, for the purpose of assisting in this way (T. R. 45). Pocoroba came to the concession frequently, at least several times a week, and succeeded in obtaining the confidence of appellant; so well did he succeed that he was

soon eating at appellant's house on an average of twice a week (T. R. 45). At times he even assisted appellant at the concession, picking up rings and working right along with him (T. R. 47). He made many representations to appellant in order to instill confidence and to cement a friendship. Among other things he told appellant he was in an accident (T. R. 45), had injured his mouth or jaws and had difficulty eating (T. R. 46). This prompted appellant to invite him to his house for home cooked food. The friendship grew between Pocoroba and appellant and his family; they went to shows together and made trips to San Francisco together. Appellant's children called Pocoroba "Uncle Benny" and played with him (T. R. 46, 166). Pocoroba also told appellant he had a son who was in the Air Force and stationed at Merced and that he visited him on weekends (T. R. 46). Once a week Pocoroba bought a chicken and appellant's wife prepared it for him. In the beginning he had asked appellant if he could board at his home. He was treated like one of the family (T. R. 46). Several times appellant took Pocoroba with him to San Francisco (T. R. 166).

One day Pocoroba talked to appellant about his income. Lots of times he would talk to appellant about money, telling him how much he had and was receiving. He said he was getting about $500 a month income out of real estate (T. R. 46, 166, 167), whereupon appellant was prompted to say: "You lucky—you got nothing to worry about—I wish I have that much myself, but I am not so lucky" (T. R. 167).

A conversation between Pocoroba and appellant concerning narcotics developed. Pocoroba first mentioned the subject to appellant in explaining his income and the good financial condition he was in, but appellant paid no attention to it (T. R. 167). Pocoroba kept bringing up the matter of narcotics, obviously in an effort to lead appellant on, and later asked appellant if he knew where narcotics could be procured. Appellant told him he would not have anything to do with narcotics because of his previous trouble and that he had his family to look out for (T. R. 167). Appellant did not know that Tocco, Barri or Lagaipa had ever had anything to do with narcotics and would not have permitted himself or his family to associate with them had he known they were connected with narcotics in any way (T. R. 167, 168).

Pocoroba testified that the subject of narcotics came up when appellant told him he had been convicted for counterfeiting in 1935 and commented that "the counterfeiting racket was lousy, the only ones that made money were the ones that printed the money" and that he would sooner deal in narcotics than in counterfeit money. He maintained that appellant was the first one to mention narcotics and did not recall what brought the discussion up (T. R. 48). In this connection Pocoroba testified that appellant asked him what heroin sold for in the east and inquired if a can of opium would make an ounce of heroin, and that appellant suggested to him that he write his friends in Chicago to see if he could make a connection (T. R. 27, 28). However, Pocoroba admitted that it was his

duty as an undercover agent to talk about narcotics while working on the case and that he talked to appellant daily about various rackets (T. R. 48). Appellant expressed envy at Pocoroba's income and observed that he was just a poor man and had a big family to take care of and wondered how Pocoroba did so well (T. R. 49). This prompted Pocoroba to inform appellant that he used to be in the narcotic racket in New York and that is where he used to make his money. Pocoroba admitted telling appellant this in order to gain his confidence. It was then that further discussion was had about narcotics (T. R. 49). Pocoroba let appellant believe that he had dealt in narcotics in a substantial way before in New York and that he was a sizeable narcotic dealer, all in order to further instill confidence in appellant (T. R. 49, 50); further that he used to import narcotics from Germany and used to have someone on the boats who would pay off and take care of things for him on the boats; also that he had a good narcotic contact in Chicago and that if appellant had narcotics that he had this good narcotic contact in Chicago who could take it off his hands. He had in mind appellant being the source of supply and disposing of it in Chicago or Texas or some other place. He also let appellant know that he had written letters relative to the disposal of narcotics and showed appellant a letter supposed to be in answer to the letter he had sent (T. R. 50).

Pocoroba informed appellant that his son was flying to different parts of the country and suggested that he could fly to Mexico and bring back some narcotics

if appellant could obtain it there, whereupon appellant replied he would have nothing to do with it (T. R. 168). Pocoroba maintained that this plan was suggested by appellant (T. R. 51, 52) but that the head of his department would not sanction it (T. R. 51, 52).

Pocoroba talked to appellant about narcotics on several occasions. Appellant would have nothing to do with narcotics and finally this type of conversation ceased and was not revived until about an hour and a half or two hours prior to appellant's arrest (T. R. 169) on Wednesday, August 16, 1945 (T. R. 109 and 173-4).

On August 9, 1944, appellant drove to San Francisco for supplies and was accompanied by Tocco and Barri who were leaving for the east (T. R. 52, 163, 164). Appellant was informed by Tocco and Barri that they were to get reservations in San Francisco for the east (T. R. 164). Federal narcotic agents trailed appellant's car to San Francisco and observed the activities of appellant, Tocco and Barri while in San Francisco (T. R. 89). Appellant's first stop in San Francisco was at a place on 24th Street near Van Ness where he got out of his car and went into a building and remained there about twenty minutes (T. R. 89). The building was a sort of warehouse and an olive oil place (T. R. 96) where appellant ordered some Italian oil (T. R. 164). Returning to the automobile appellant then drove on, stopping on Geary Street between Powell and Stockton where Tocco got out. Appellant then drove away with Barri still in the car.

Tocco went into a Santa Fe ticket office and soon after rejoined appellant and Barri at a bar operated by a friend of appellant's named Scambellone on Grant Avenue (T. R. 99 and 164).

Barri and Tocco had brought along two pieces of luggage which were clearly visible inside the car at all times (T. R. 90 and 123). Barri and Tocco were unable to get reservations and asked appellant if he had some friend who could keep the suitcases for them until they were able to get reservations for the east. Appellant had another friend, a taxicab driver he has known for twenty years, take the luggage to Scambellone's apartment (T. R. 164, 165 and 100). Scambellone supplied appellant with the key to his apartment and appellant returned the key to him after the taxicab driver took Tocco and Barri's luggage to Scambellone's apartment. Appellant did not go to the apartment himself (T. R. 83, 84). Later in the afternoon appellant was seen by an agent walking from the direction of Scambellone's apartment back towards his bar, a distance of two and a half or three blocks (T. R. 91). Appellant then went about purchasing groceries to take home to Santa Cruz, also stopping at a macaroni factory on Pacific Street to buy some spaghetti. After making these purchases appellant returned to Scambellone's bar, had a couple of drinks, said good-by and returned alone to Santa Cruz (T. R. 165 and 97).

In the evening after appellant had left for Santa Cruz, Tocco went to a theater, after which he went

to the Whitcomb Hotel on Market Street where he was seen with Barri (T. R. 91).

On the following day, Thursday, August 10, Tocco left the hotel between 8 and 9 o'clock in the morning, went into a coffee shop later into a bar, and then to Scambellone's bar on Grant Avenue (T. R. 91). On the same day about noon Tocco and Barri were seen coming out of the Whitcomb Hotel, and from there to the Greyhound Bus Station at 5th and Mission Streets, walk around town together and later take a street car to the North Beach section. Tocco walked up to Scambellone's bar on Grant Avenue while Barri stood on the corner watching Tocco. Barri then walked rapidly up Broadway, entered a theater and remained about ten minutes, emerging without a hat. He was watching behind him and looking up and down the street, finally catching a street car. When Barri entered the theater he appeared to have observed someone. He was later seen to board a bus for Santa Cruz at about 5:20 P.M. at the bus station at 5th and Mission Streets (T. R. 92).

Two days previously, on August 8th, agents observed Tocco and Barri leave appellant's house in Santa Cruz at about 11:50 A.M. and go to a stationery store (T. R. 94) where they purchased four large sheets of brown wrapping paper and one large roll of brown gummed paper tape (T. R. 85). The agents did not follow Tocco and Barri after they left the store to see where they took the packages (T. R. 95).

When appellant returned to Santa Cruz he saw Pocoroba and asked him if Tocco or Barri returned

to Santa Cruz if they could stay in his cabin (T. R. 32). He had received a phone call previously from Tocco stating that he had missed Barri and was worried about what happened to him. Tocco asked appellant to tell Barri to call him if he saw him. Appellant gave this message to Pocoroba and asked him to let Tocco know if he saw Barri. Tocco did not say he was coming back to Santa Cruz (T. R. 169, 53).

Pocoroba gave permission for Tocco or Barri to use his cabin, and upon immediately returning to his cabin he found that Barri was already there (T. R. 53 and 33).

Barri was nervous and afraid to go out the door and asked Pocoroba to have appellant get in touch with somebody in San Francisco to see that Tocco got safely back to Santa Cruz. Appellant gave Pocoroba a telephone number to call which was the number at Scambellone's bar on Grant Avenue in San Francisco, appellant being too busy working at the concession at the time and not having the opportunity to phone himself. Barri wanted to phone to Tocco in San Francisco to tell him to bring back the suit cases to Santa Cruz.

Tocco and Barri gave up their quarters in the Santa Cruz mountains on August 6th and returned to appellant's house. Barri stayed with Pocoroba in his cabin from August 10th until the morning of August 13th. Tocco stayed in Pocoroba's cabin from the night of August 11th to the early morning of August 13th. Previous to this time Tocco frequently used

Pocoroba's cabin to dress and undress for the beach (T. R. 54).

Pocoroba had previously met Tocco about July 6, 1944, at appellant's house (T. R. 28) and met Barri on July 21st on the Boardwalk where he was accompanied by Tocco, Tocco introducing Barri to him (T. R. 29).

Pocoroba testified that on Thursday evening, August 10th, appellant came to his cabin about 11 o'clock; that Barri was present and told appellant he had been followed while in San Francisco and further said: "That is not the proper thing to do, to take me to a strange city, put me on a hot spot and let the police look me over"; that appellant answered that he was crazy, that he did not know what he was talking about, that he had taken him among friends, and that nobody had followed him; that Barri then replied: "Listen, I am from New York, and I know when I am being followed. You don't have to tell me"; that Barri further said: "Furthermore, what good did it do to bring the grips to your friend's house when he would not give me permission to load the stuff?"; that appellant replied that he had been in too much of a hurry, that he was nervous and excited, that there would have been other ways of loading the stuff; that appellant then said: "I had the man bring the stuff in San Francisco and from San Francisco he has to bring it here"; that Barri then said: "Well, we don't do business like this in New York. Whenever we have a stranger in New York for business purposes we always look after his safety"; that appellant then

left the cabin and Barri remained there all night (T. R. 33).

Appellant denied that any such conversation took place (T. R. 170).

On Friday evening, August 11th, Tocco came to Pocoroba's cabin with three pieces of luggage (T. R. 33, 34).

Two pieces of luggage were identified as the same luggage Tocco and Barri took with them to San Francisco a day or two previously which appellant left for their convenience with his friend Scambellone (T. R. 34).

Barri was in the cabin. Tocco and Barri slept in Pocoroba's cabin that evening. On the following morning, Saturday, August 12th, appellant came to the cabin shortly after 9 o'clock. Pocoroba testified a conversation then took place and that appellant said to Barri: "The man is here again and I have already given him the money. Now it is entirely up to you. You take the stuff or they will dump it in the ditch"; that Barri then said: "I don't know how you people do business in California. * * * Where do you expect me to pack this stuff, in the street? Your friend in San Francisco won't give me permission to pack it in his house; you won't give me permission to pack it in your house. What am I to do?"; that appellant then got up and said: "I am going to work. Think it over and let me know" (T. R. 34, 35). Appellant also denied that this conversation took place (T. R. 170).

Pocoroba further testified that at about 5 o'clock in the afternoon of the same day, Tocco asked permission to pack the opium in his cabin and that he granted it; that Tocco then left and returned in about ten or fifteen minutes; that Barri was in the cabin at the time; that after 11 o'clock the same evening, while Tocco and Barri were still in his cabin with him, appellant came in carrying a pasteboard box covered by a newspaper, giving it to Tocco who placed it on the floor; that appellant then went away and came back in a few minutes with another box of about the same size, also wrapped in a newspaper, which Tocco received; that appellant then departed, after consuming a drink; that as he left appellant said to Tocco: "I will pick you up at 5 o'clock."

On this point Pocoroba's testimony varied. He first testified appellant said: "I will pick you up at 5 o'clock" (T. R. 35). Later he testified, "Just at 5, something like that" (T. R. 56 and 79).

The cartons which Pocoroba claimed appellant brought into his cabin were covered and not disturbed nor contents removed until appellant left the cabin shortly after (T. R. 55).

Pocoroba claimed he knew what was in the two cartons because Barri told him he had come to Santa Cruz and laid out $22,000 for 100 cans of opium; that he gave $22,000 to appellant for the purchase of the opium (T. R. 61); that Barri further told him he had given appellant $22,000 in $1000 and $500 bills for the purchase of 105 cans of opium, and that he had been followed by detectives in San Francisco and had no intention of doing any business (T. R. 74).

Appellant admitted going to Pocoroba's cabin after 11 o'clock that evening, but asserted that he remained there only a few minutes. He testified that he was working at his concession and stopped by for a drink as he was accustomed to frequently doing; that he saw Tocco and Barri in the passageway outside the cabin with some kind of a box and went into the cabin with them; that after the drink he went back to work at his concession (T. R. 170, 171).

Pocoroba testified that appellant did not wear gloves when he carried the cartons into the cabin (T. R. 155); examination for fingerprints did not reveal appellant's fingerprints on the cartons (T. R. 157).

Pocoroba further testified that after appellant left the cabin Tocco and Barri produced a scale, the brown colored wrapping paper and tape they had previously purchased in the store in Santa Cruz, and weighed the cans of opium that were concealed in the two cartons previously carried into the cabin by appellant and packed the packages into two suitcases; that Barri asked Pocoroba for some gloves, saying: "In the laboratory we always use gloves so that we don't leave any fingerprints in the cans or on the utensils"; that he did not have any gloves, but offered Barri a pair of new socks which Barri tried to use but found he couldn't do so (T. R. 35 to 37).

Pocoroba further testified that Tocco and Barri finished weighing and packing the cans of opium at about 1 o'clock in the morning (T. R. 37) and went to bed about 2 o'clock A.M.; that about 3:30 A.M. somebody wrapped at the door, that Tocco opened

the door and appellant said: "Let's get the grips and let's go"; that Tocco was dressed; that he had not undressed for the night, merely taking off his shoes; that Tocco then took the two pieces of luggage containing the cans of opium and left the cabin; that Barri remained in the cabin with him; and that later that morning he accompanied Barri to the bus station and had not seen him since (T. R. 38); that immediately after leaving Barri at the bus depot he endeavored to contact the other Federal Narcotic officers in Santa Cruz (T. R. 39).

Pocoroba testified that he did not see the person who knocked on the door of his cabin at 3:30 Sunday morning, August 13th, but could only hear a voice which might have been the voice of appellant (T. R. 65 and 79). He heard the person say: "Get your grips; let's go" (T. R. 65). In his later testimony Pocoroba erased any doubt in his mind that the voice was that of appellant, although he did not see the person (T. R. 79). Previously Pocoroba stated only that it sounded like appellant's voice and that he recognized it as appellant's voice (T. R. 77) and that it might have been appellant's voice (T. R. 79).

At that particular hour in the morning, neither Pocoroba nor any of the other agents observed what Tocco did or where he went from the time he left the cabin at 3:30 Sunday morning, nor who accompanied him, if anyone (T. R. 67).

Appellant denied being at Pocoroba's cabin early Sunday morning, asserting he was home asleep (T. R. 174). Appellant testified that he left his concession

around 2 A.M. Sunday morning, August 13th, and went home to bed; that at about 7 or 7:30 A.M. after getting up he went to the Boardwalk again to his concession to stock his shelves and remained there about an hour and a half, then returning home again, getting home about 9 or 9:15 A.M.; that he returned home in the Chevrolet automobile; that he had his breakfast and read a paper; that his wife had not returned home from Church yet; that about 10:30 he went back to his concession; that he met Pocoroba about 11:30 A.M. (T. R. 172, 173 and 39).

One of the agents, Maguire, testified that he was observing appellant's house on Sunday morning, August 13th, and that at about 9:15 A.M. he saw a Chevrolet automobile drive in to appellant's driveway leading to his home (T. R. 112).

Pocoroba hastened to contact the other agents which was done later in the day, and reported to them what had happened (T. R. 39). He and the other agents then went to contact the District Supervisor and departed for the Oakland Mole in an effort to locate Tocco on any train leaving for the east, but were unable to find him. Pocoroba then returned late Sunday evening to his cabin in Santa Cruz where he turned over to the other agents the two cardboard boxes and some brown wrapping paper and brown gummed paper tape (T. R. 39). The brown paper and brown gummed tape was the left over portion of the materials previously purchased by Tocco and Barri and used in wrapping the cans of opium (T. R. 40).

Pocoroba then returned to San Francisco on Monday and came back to Santa Cruz on Wednesday

afternoon, August 16th. He saw appellant at his concession on the beach at about 4 o'clock in the afternoon (T. R. 41), at which time Pocoroba asked appellant if he had heard from the boys and appellant replied: "No, if I don't hear from them again I would be glad. They are certainly lousy. Joe Tocco was introduced to me by a friend of mine, and the others were lousy." Pocoroba testified further that he asked appellant where he took Joe Tocco and that appellant said to Berkeley (T. R. 42).

Appellant denied such conversation took place; on the other hand asserted that Pocoroba at that time asked him if he could get him ten cans of dope and that he replied to him: "I don't need no help, I got no dope"; that Pocoroba then said: "Forget about it" (T. R. 174).

Pocoroba admitted that he asked appellant to get him ten cans of opium and that appellant replied that it was not his policy to deal in small amounts, but that he would do it for him for a price of $225 a can and that he would do it in about a week (T. R. 78).

This conversation took place on Wednesday, August 16th, just prior to appellant's arrest (T. R. 71); at about 6 P.M. the same day (T. R. 174). Pocoroba further admitted that appellant did not procure these or any other narcotics for him at this or any other time (T. R. 71); further that appellant was never seen to give anybody any narcotics or money for narcotics (T. R. 72).

Appellant denied that he knocked on Pocoroba's cabin at 3 or 3:30 the previous Sunday morning or that he drove Tocco to Berkeley (T. R. 174, 175).

Agent Newman left Santa Cruz on August 14th and departed for the east by plane and arrested Tocco as he got off the train coming into Chicago. Tocco's train had arrived from San Francisco (T. R. 126, 127). Tocco had with him the two suit cases observed by the agents previously in San Francisco and Santa Cruz at Pocoroba's cabin (T. R. 127) which contained a total of 95 cans of opium, a package of opium weighing a little over 8 ounces and 8 ounces of morphine in a sugar box (T. R. 128). The cans were wrapped in brown wrapping paper and sealed with brown gummed tape similar to the paper and tape purchased by Tocco and Barri previously in Santa Cruz and which Pocoroba observed Tocco and Barri using to wrap the packages previously in his cabin and turned over after Tocco's departure by Pocoroba to the other agents (T. R. 128, 129).

STATEMENT OF POINTS RELIED ON.

Appellant relies on the two following points:

1. The double jeopardy clause of the Fifth Amendment to the Constitution was violated by the verdicts finding appellant guilty on Counts 1 and 2 of the indictment and by the court ordering the sentences pronounced on each of said counts to run consecutively.

(Additional Assignment of Errors 10, 11, 12, T. R. 189-190.)

2. The evidence was insufficient to support either the verdict of guilty or the judgment and sentence on Count II.

(Assignment of Errors 1, 2, 3, 4, 9, T. R. 22-23.)

ARGUMENT.

1. THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION WAS VIOLATED BY THE VERDICTS FINDING APPELLANT GUILTY ON COUNTS 1 AND 2 OF THE INDICTMENT AND BY THE COURT ORDERING THE SENTENCES PRONOUNCED ON EACH OF SAID COUNTS TO RUN CONSECUTIVELY.

The assignment of errors filed herein specifies the foregoing points as follows:

> That the trial court erred in rendering judgment on each of the verdicts of guilty, finding defendant guilty on both counts one and two of the indictment, in that said counts of said indictment state facts constituting but one offense. (Paragraph 10, Additional and Amended Assignment of Errors, T. R. 189.)
>
> That the trial court erred in ordering the sentences, pronounced by the court in rendering judgment on counts one and two of the indictment, to run consecutively in that said counts of said indictment state but one and the same offense. (Paragraph 11, Additional and Amended Assignment of Errors, T. R. 189-190.)
>
> That the pronouncement of judgment upon both the verdicts finding defendant guilty on both counts of the indictment and ordering said sentences to run consecutively, constitutes a violation

of the double jeopardy clause of the Fifth Amendment to the Constitution of the United States in that the facts stated in counts one and two of said indictment constitute a statement of but one and same offense. (Paragraph 12, Additional and Amended Assignment of Errors, T. R. 190.)

Count one of the indictment (T. R. 2) charges that the defendant did

> "* * * on or about the 12th day of August, 1944, at the City of Santa Cruz, State of California * * * fraudulently and knowingly did conceal and facilitate the concealment of a lot of smoking opium in quantity particularly described as 105 tins containing approximately 700 ounces of smoking opium," etc.

Count Two of the indictment (T. R. 2) charges:

> "That on or about the 13th day of August, 1944, at the City of Santa Cruz, State of California, * * * said defendants fraudulently and knowingly did facilitate the transportation of a lot of smoking opium, in quantity particularly described as 105 tins containing approximately 700 ounces of smoking opium," etc.

A mere reading of the two counts discloses that they refer to the same place, the same time and the same opium. They are based on the same statute.

The evidence discloses that the same identical tins of opium—and no others—are involved in both counts, that the same time and place is also involved and that

the events of the night of August 12th and early morning of August 13th constitute one continuous, unbroken occurrence. In other words, the events occurring at the times alleged in the indictment and disclosed by the evidence constitute but one indivisible offense.

Stripped of surrounding circumstances the events in question will be found in the testimony of the witness Pocoroba. Though appellant contradicts Pocoroba in many vital particulars, we will assume that the jury believed Pocoroba and here set forth his testimony as to what occurred at the times in question. It should be remembered that Pocoroba's testimony presents the facts in the light most favorable to the United States.

Pocoroba's testimony will be found in the transcript of record from page 34 to page 38 as follows:

> "On the following morning, Saturday, August 12th, Maugeri told Barri, 'The man is here again and I have already given him the money. Now, it is entirely up to you. You take the stuff or they will dump it in the ditch.' At that time Barri said, 'I don't know how you people do business in California.' He said, 'Where do you expect me to pack this stuff, in the street? Your friend in San Francisco won't give me permission to pack it in his house; you won't give me permission to pack it in your house. What am I to do?' Maugeri then got up and said, 'I am going to work. Think it over and let me know.' Maugeri then left the cabin shortly after 9:00 o'clock on that morning. About 5:00 o'clock in the afternoon of that same day Joe Tocco was in

my cabin, and he asked me for permission to pack the opium in my place. I agreed. Tocco then left the cabin, and returned in about ten or fifteen minutes. Barri was in the cabin with me at the time Tocco returned. The cabin consists of a combination living and bedroom, a kitchen and a bathroom. * * * After 11:00 o'clock on Saturday evening August 12th, Joe Tocco and Joe Barri and myself being present, Maugeri came into the cabin carrying a pasteboard box covered by newspaper. He gave it to Tocco, who put it on the floor. Maugeri then went away and came back a few minutes later with another box about the same size, also wrapped in newspaper and Tocco received it. I then mixed a drink and gave it to Sam Maugeri. He drank it in a hurry and went away. Maugeri had no conversation with Tocco or Barri at this time and place. When Maugeri left he said to Tocco 'I will pick you up at 5:00 o'clock.' * * * Tocco produced a small mail scale. They cleared the bureau of all the articles there were on it, and they placed the scales on the bureau, and Joe Barri started to weigh each individual can of opium, and Joe Tocco would mark down the weight. * * * They weighed each can separately and they marked the weight on a piece of paper, and then they started to wrap it in brown wrapping paper into bundles and tied the bundles with gummed paper tape and then put the bundles in the brown leather bag and the blue overnight bag. The big bag was then placed under the bed and the small bag on a chair. They finished weighing the cans around 1:00 o'clock, which would then be Sunday morning, August 13th. I went to bed at that time. * * * I retired in the single bed at about 1:00 o'clock and Barri

and Tocco did not retire until 2:00 o'clock. They occupied the double bed in my cabin. At about 3:30 somebody rapped at the door and Joe Tocco went to the door and opened it, and Sam Maugeri said, 'Let's get the grips and let's go.' Tocco was dressed; he hadn't undressed for the night, but he had taken his shoes off. Tocco then took the brown leather suitcase, Government's Exhibit 1 for Identification, and the blue overnight bag, Government's Exhibit 2 for Identification, and left the cabin. Barri and I remained in the cabin."

The evidence fails to disclose that Maugeri ever had possession of the pasteboard boxes at any time prior to 11 o'clock on the night of August 12th. The Government's evidence is silent as to any acts of Maugeri after 3:30 in the morning of August 13th. Thus, the testimony as to Maugeri's activities is limited to a continuous period of but four and one-half hours. The events during this period are as follows: At 11 P.M. Maugeri comes into the cabin (not Maugeri's cabin, but the cabin of Pocoroba) carrying two pasteboard boxes; after Maugeri left Tocco and Barri opened the boxes and removed the contents consisting of tins (these tins were unmarked and unopened, only the testimony of Pocoroba is to the effect that they contained opium); they weighed the tins, wrapped them in wrapping paper, packed them in suitcases and at 3:30 A.M. these suitcases were carried from the cabin by Tocco. Here the evidence stops.

Maugeri testified that on Saturday night, August 12th, he went to Pocoroba's cabin where he saw Poco-

roba, Tocco and Barri and had a drink with them; that he stayed there about six or ten minutes then went back to his concession (T. R. 171) where he remained until around a quarter to two (T. R. 172) after which he went home and to bed and did not get up until 7 or 7:30 on the morning of Sunday, August 13th. (T. R. 172.) There is no evidence in the record contradicting the testimony of Maugeri as to his activities after 11 P. M. on August 12th, except the testimony of Pocoroba that the voice that spoke from outside the door of his cabin at 3:30 on the morning of the 13th was that of Sam Maugeri (T. R. 38); that he did not see the person who spoke (T. R. 38, 79); that it might have been Maugeri's voice (T. R. 79); that it sounded like Maugeri's voice (T. R. 77.)

Assuming that the boxes contained opium, we come to the unalterable conclusion that the acts of Maugeri were but necessary incidentals to the ultimate transaction. Maugeri was accused and convicted of (a) concealing and facilitating the concealment of the opium and (b) facilitating the transportation of the same opium. Before the opium could be concealed it had to be possessed. Before the opium could be transported it had to be possessed. The concealment of the opium, whether by wrapping the tins in wrapping paper or putting them in the suit cases, was an incidental part of the transportation.

As the entire transaction, according to the Government's contention and evidence, consisted of the transportation of the opium from Santa Cruz to some other place, the acquiring possession of the opium and the

wrapping and packing of the opium were necessary and incidental to the ultimate act of transportation.

The cases are many and uniform that, under the facts disclosed, the offense committed, if any, was but one and could only be punished once.

The question of double jeopardy is not confined to a mere reading of the indictment or judgment. It is sufficient if such fact appear anyhere in the record.

> "It is true that in the case of Snow we laid emphasis on the fact that the double conviction for the same offense appeared on the face of the judgment; but if it appears in the indictment or anywhere else in the record (of which the judgment is only a part), it is sufficient."
>
> *Ex Parte Nielsen,* 131 U. S. 176, 183, 33 L. ed. 118, 120.

The cases establishing that the facts herein prove but one offense for which only one punishment can be imposed follow:

> "It is, however, assigned for error that the court erred in imposing sentence on both counts of the information. In this we concur, and think that what the court did amounted to imposing a double sentence for a single offense. The same facts proved unlawful possession and unlawful transportation. The only act of possession testified to was the possession necessarily involved in the transportation which was the subject of the second count. The officer testified that he saw the defendant leave the hallway of a five-story tenement house with a package which contained six bottles of gin, which he deposited in his auto-

mobile. There is no evidence that the accused lived on the premises, and his own testimony was that his home was in Brooklyn, on Decatur street. The possession was necessary and incidental to the act of transportation. There may be, and commonly is, possession which is distinct from transportation.

"Possession for a substantial time, and followed by transportation, might constitute two distinct offenses, just as possession for a substantial time, followed by a sale, might amount to two distinct offenses. But, where the only possession shown is that which is necessarily incidental to the transportation, the offense is single, and not double. (Citing cases.) And the law is settled that, where a person is tried and convicted of a crime which has various incidents included in it, he cannot thereafter be tried and punished for an offense consisting of one or more of such incidents. To do so would be to inflict double punishment."

Schroeder v. United States (C.C.A. 2), 7 Fed. (2d) 60, 65.

In *Copperthwaite v. United States* (C.C.A. 6), 37 Fed. (2d) 846, defendant was charged in two counts: first, with the purchase and sale of unstamped morphine and secondly, with buying and selling the same amounts of morphine. The first count charged a violation of the Harrison Anti-Narcotic Act and the second count a violation of the Narcotic Import Statute. The appeals court held that defendant could not be punished under both acts, and, at page 847, states:

"When a single act is a violation of two laws, it may be penalized in each; but this conclusion

leads to an inquiry as to double punishment. *The same act may not be twice punished by the same sovereignty, merely because it violates two laws.* Identity, as to double punishment as well as to double jeopardy, is shown if the same evidence necessary to prove either offense will also necessarily establish the other and this relation is reciprocal (and perhaps even if not reciprocal); in other words, can either be shown without disclosing the other? Reynolds v. U. S. (C. C. A. 6) 280 F. 1, 2; Miller v. U. S. (C. C. A.) 300 F. 529, 534. When thus tested there was here double punishment. The entire proof in this case consisted of evidence that the defendants agreed to furnish and sell morphine to a purchaser and thereafter did have it (unstamped) in their possession and deliver it to him. By virtue of the presumption declared in the Harrison Act, this possession tended to show the forbidden purchase; and the same possession also tended—by virtue of the presumption declared in the Import Act—to show unlawful importation and defendants' knowledge. In such case the government may punish for either offense, but we think the supporting evidence does not so materially vary as to justify two punishments, merely because two inferences are attached by different statutes to the same evidential basis." (Italics ours.)

In *Morgan v. United States* (C.C.A. 4), 294 Fed. 82, defendant was charged with unlawfully manufacturing whisky, the unlawful possession of whisky and the unlawful possession of property designed for the manufacture of whisky. The Court held only one offense and not three had been committed, stating, at page 84, as follows:

"Conviction of the defendant on the charge of manufacturing moonshine whisky, under the facts of this case, necessarily embraced conviction of the offense of having in possession the same moonshine whisky, and the offense of having in possession property designed for the manufacture of moonshine whisky, charged in counts 1 and 2 of the same indictment. The act charged in count 3 included acts charged as crimes in counts 1 and 2. It follows that the sentence under counts 1 and 2 must be set aside, as was properly conceded by the United States Attorney."

The Appeals Court for the Sixth Circuit rendered the following opinion:

"It is next urged that sentences for the sale and for the possession constitute a double punishment for the same act. We think this contention is sound. The act of possession relied upon was merely the possession necessarily incidental to the sale which was the basis of the sale count. We considered this subject in Reynolds v. U. S., 280 Fed. 1. While there may be, and commonly is, possession without sale, so that possession for a substantial time, followed by a sale, might be two distinct offenses, in this case the only possession shown was that which temporarily came to Miller for the purpose of completing by delivery the sale which he was making. The same testimony which showed the sale necessarily showed the only possession which is shown at all."

Miller v. United States (C.C.A. 6), 300 Fed. 529, 534.

This Court has followed the foregoing rules in *Parmagini v. United States* (C.C.A. 9), 42 F. (2d) 721:

"With reference to Counts I and III, one for selling morphine and the other for distributing opium, the transaction was an entity, the delivery of the opium was a mere incident to the delivery of the morphine, and the transaction comes clearly within the rule stated by the Circuit Court of Appeals for the Eighth Circuit in the last mentioned case." (Referring to the case of *Bradin v. United States,* 270 Fed. 441, 443.)

The Supreme Court of California has applied the rules and reasonings of the foregoing cases and has ably summed up the manner of their application in a case where the defendant was charged in two counts with having a still in his possession and control and in unlawfully operating such still. We quote from a portion of the California Court's opinion:

"As early as *People v. Shotwell,* 27 Cal. 394, and *People v. Frank,* 28 Cal. 507, it was held that co-operative acts constituting but one offense when committed by the same person at the same time, when combined, charge but one crime and but one punishment can be inflicted as one offense. 'Where a statute makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a stage in the same offense, it has in many cases been ruled they may be coupled in one count. Thus, setting up a gaming table, it has been said, may be an entire offense; keeping a gaming table and inducing others to bet upon it, may also constitute a distinct offense; for either, unconnected with the other, an indictment will lie. Yet when both are perpetrated by the same person, at the same time, they constitute but one

> offense, for which one count is sufficient, and for which but one penalty can be inflicted.' (Wharton on Criminal Law, approved in People v. Shotwell, 27 Cal. 394.)"
>
> *People v. Clemett,* 208 Cal. 142, 144.

The California Court then states the reasons why a statute, such as the one involved herein, containing several elements in the disjunctive should not be construed as inflicting a separate penalty for the doing of each element thereof:

> "All of the acts set out in the statute before us for construction are coupled with the disjunctive 'or', one of which or all of which joined constitute but one offense. * * *
>
> "The severity of the penalty for the violation of the provisions of the act, the maximum being five years' confinement in the state prison, and a fine of $5,000, is in confirmation of our construction. It was not the intent of the legislature that the several acts named in the statute before us should be split into several separate offenses for the purpose of imposing a penalty for the violation of each singly."
>
> *People v. Clemett,* 208 Cal. 142, 145-147.

In the case at bar we have but one statute in which all the acts set out therein are coupled with the disjunctive "or". Clearly Congress never intended that a person should suffer imprisonment for 70 years and be fined in the sum of $35,000 because he had unlawfully imported, received, concealed, bought, sold, facilitated the concealment and facilitated the trans-

portation of the same lot of narcotics in one continuous operation.

In *United States v. Adams,* 281 U. S. 202, 74 L. ed. 807, Adams, a bank officer, had previously been tried and acquitted for making a false entry in a book of the bank which imported a remittance of $75,000 to another bank to the credit of defendant. Subsequently Adams was again indicted for making a false entry in another book of the bank importing that he had made a deposit of $75,000 to his credit. Adams pleaded a former acquittal. The Supreme Court upheld the plea of former acquittal and in doing so stated:

> "* * * The two entries had reference to the same transaction, were based upon the same draft and were *the correlated means of accomplishing a single fraud,* if fraud there had been. The district court held that on its construction of Rev. Stat. §5209 * * * there could be but one prosecution for false entries based upon any single draft, even though several different entries were made in the different books of the bank, all relating to the same. Therefore it sustained the plea. The United States appealed.
>
> "It is a short point. The statute punishes any officer of a Federal reserve bank who makes any false entry in any book of the bank with intent, etc. The government contends for the most literal reading of the words, and that every such entry is a separate offense to be separately punished. But we think that it cannot have been contemplated that the mere multiplication of entries, all to the same point and with a single intent, should multiply the punishment in proportion to the

> complexity of the bookkeeping. The judgment in the case is affirmed." (Italics ours.)

Here it was not contemplated that the punishment should be multiplied for the doing of a series of acts, all to the same point and with the same intent, merely because it required more than one act to accomplish the ultimate design.

Maugeri was not charged either with the possession of narcotics or with the transportation of narcotics, a matter we will discuss in dealing with the insufficiency of the evidence; he was charged with concealing, facilitating the concealment, and facilitating the transportation of narcotics. If Maugeri's act of bringing the two boxes into Pocoroba's cabin at 11 o'clock was for the purpose of Tocco and Barri wrapping and placing the opium in the suitcases in order that it could be transported to some other place, then Maugeri's act was but one act and consisted in facilitating the concealment *and* transportation of the opium, an act that was a necessary incidental to the ultimate act.

Under the facts the sentence imposed on Maugeri—10 years' imprisonment and $5000 fine on Count I and 10 years' imprisonment and $5000 fine on Count II, said *sentences to run consecutively* (T. R. 17-18)—constitute double punishment and double jeopardy. The judgment and sentence on Count I should be set aside.

2. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT EITHER THE VERDICT OF GUILTY OR THE JUDGMENT AND SENTENCE ON COUNT II OF THE INDICTMENT.

The assignment of errors filed herein specifies the foregoing points as follows:

> That the verdict is contrary to the evidence adduced at the trial here (Assignment of Error 1, T. R. 22).
>
> That the verdict is not supported by the evidence (Assignment of Error 2, T. R. 22).
>
> That the evidence adduced at the trial is insufficient to justify said verdict (Assignment of Error 3, T. R. 22).
>
> That said verdict is contrary to law (Assignment of Error 4, T. R. 22).
>
> That the trial Court erred in denying defendant's motion made at the close of plaintiff's case, for a directed verdict of acquittal on both counts of the indictment, for the reason that the legal evidence as a matter of law was insufficient to support a verdict of guilty. (Assignment of Error 9, T. R. 22-23).

Count II of the indictment charges the defendant with a violation of the *Jones-Miller Act,* the count reading in part as follows:

> "That on or about the 13th day of August, 1944, at the City of Santa Cruz, State of California, * * * said defendants fraudulently and knowingly did *facilitate the transportation* of a lot of smoking opium * * *." (T. R. 2.)

The *Jones-Miller Act* reads in part as follows:

> "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall be fined not more than $5,000 and imprisoned for not more than ten years. * * *"
>
> 21 U.S.C.A. 174.

We emphasize to this Court the fact that Maugeri *was not charged* with either the possession or transportation of opium; he was charged with *facilitating* the transportation of the opium. This Court has held that possession is not an element of the offense prescribed in the Jones-Miller Act (see *Pon Wing v. United States* [CCA-9], 111 F. (2d) 751, 758) and by a parity of reasoning and the absence of such wording in the Act, transportation is not an element of the offense. Possession and transportation constitute a violation of the Harrison Narcotic Act, but not of the Jones-Miller Act.

This Court has also defined the meaning of the word "facilitate" as used in the Jones-Miller Act:

> "Anything done to make the continuance of the trip 'less difficult' would constitute facilitation of its transportation. Since the term 'facilitate' seems not to have any special legal meaning, the framers of this statute must have had in mind the

> common and ordinary definition as expressed by a standard dictionary. Quoting from Webster's Unabridged Dictionary, 'facilitate' is defined as follows: 'To make easy or less difficult; to free from difficulty or impediment; as to facilitate the execution of a task'."
>
> *Pon Wing v. United States* (CCA-9), 111 F. (2d) 751, 756.

So, the phrase "transport opium" necessarily means something different from "facilitate the transportation of opium". One can facilitate such transportation without actually transporting the article. One can transport an article without doing anything to facilitate such transportation.

There is nothing in the record to show that Maugeri did any act that "facilitated" the transportation of the opium or, to use the language of this Court, Maugeri did nothing that rendered the movement of the opium "less difficult", or that operated to "make easy", or which acted to "free from difficulty or impediment" its transportation.

We have set forth above the facts relating to the night and morning of August 12th and 13th and discussed the sequence of events as disclosed by the record. All of these matters show but one continuous transaction in which each act of Maugeri was merely to bring about a concealment of the opium (if the Government's witness is believed and its theory adhered to). None of these acts "facilitated" in any manner the subsequent transportation of the opium.

In fact, if Maugeri had been charged with transportation—either as one directly performing that act or as aiding and abetting therein—the evidence would not have established guilt on his part.

For the foregoing reasons the judgment and sentence on Count II of the indictment should be set aside.

Dated, San Francisco,
May 18, 1945.

Respectfully submitted,
LEO R. FRIEDMAN,
SOL A. ABRAMS,
Attorneys for Appellant.

No. 10,939

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SALVATORE MAUGERI,	*Appellant,*
VS.	
UNITED STATES OF AMERICA,	*Appellee.*

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,
JAMES T. DAVIS,
Assistant United States Attorney,
Post Office Building, San Francisco,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

No. 10,939

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SALVATORE MAUGERI,	*Appellant,*
VS.	
UNITED STATES OF AMERICA,	*Appellee.*

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from the judgment of conviction (Tr. 17-18) of the District Court of the United States for the Northern District of California, Southern Division, convicting the appellant after a jury trial, of violation of the Jones-Miller Act (21 U.S.C. 174). The indictment alleged in the first count that the defendant and two co-defendants, on or about the 12th day of August, 1944, did conceal and facilitate the concealment of narcotics, to-wit, opium, and in the second count that on or about the 13th day of August, 1944, they did facilitate the transportation of the same opium (Tr. 2-3).

The Court below had jurisdiction under the provisions of Title 28, United States Code, Section 41,

subdivision 2. The jurisdiction of this Honorable Court is invoked under the provisions of Title 28 United States Code, Section 225, subdivisions (a) and (d).

STATEMENT OF THE CASE.

Appellant's statement of the case is given in a light most favorable to himself and does not present to the Court an adequate picture of the facts upon which the conviction is based. Therefore, we make the statement which follows.

STATEMENT OF FACTS.

Benedict Pocoroba, a Federal Narcotics Agent for sixteen years, arrived in Santa Cruz, California, pursuant to orders from his superiors in the Federal Bureau of Narcotics on May 1, 1944. Upon his arrival he was met by other Federal Narcotics Agents and registered at a hotel under the assumed name of Benedict Vicari.

He first met the appellant, Salvatore Maugeri, known to him and to his intimates in the town as Sam Maugeri, on May 7, 1944 at the latter's concession on the Boardwalk in Santa Cruz. This concession was usually open for business from 9:00 o'clock in the morning until 1:00 o'clock the following morning and was usually attended by the appellant.

Pocoroba saw the appellant many times after this first meeting and became quite friendly with him. On

May 15, 1944 at the invitation of the appellant, he visited his home at 32 Main Street and met his wife and family. Thereafter, he visited at Maugeri's home on an average of at least twice a week.

On May 22, 1944 Pocoroba moved from his hotel to Miller's Apartments on Beach Street, where he occupied a cabin which was located a couple of blocks from the appellant's concession.

He accompanied the appellant on several trips to San Francisco by automobile, the first occasion being on June 5, 1944.

On June 6, 1944 Pocoroba, after having had dinner at the appellant's home, drove with him in one of the latter's automobiles to his concession. At this time they had a conversation about narcotics, the subject of narcotics being mentioned first by Maugeri. The Agent told Maugeri that he was not personally interested but that he had some friends in Chicago who might be. Maugeri asked him what heroin sold for in the East and whether a can of opium would make an ounce of heroin (Tr. 27).

The next day the Agent saw the appellant at his concession and the latter said, "Why don't you write to your friends which you have in Chicago and see if we can make a connection" (Tr. 27-28). Pocoroba promised to do so and later told the appellant that he had written the letter.

On June 15, 1944 the appellant came to the Agent's cabin and Pocoroba showed him a letter which he stated he had received from Chicago concerning nar-

cotics. According to the letter the men in Chicago were willing to pay $150 or $160 a can for opium. Maugeri said the best price he would sell for would be $225 to $250 a can in 50-can lots. In a previous conversation with the Agent, Maugeri said he would furnish "mud" which is the underworld term for opium (Tr. 28).

On July 6, 1944 Pocoroba met a man by the name of Joe Tocco at Maugeri's house. This man was introduced to the Agent as "Joe from San Diego" and Pocoroba was introduced as Mr. Vicari. This meeting took place in the morning and the witness testified that it appeared that Tocco had spent the night in Maugeri's home. The Agent met Tocco several times after this at Maugeri's home where Tocco was stopping (Tr. 28).

On July 8, 1944 the Agent met the appellant's son, who was home from the Navy on furlough. At that time the appellant introduced "Joe" to his son as Joe Tocco. On one occasion the Agent accompanied Tocco and Maugeri to San Francisco in an automobile which the appellant had purchased for his son (Tr. 29).

On July 21, 1944 Pocoroba was introduced by Tocco to Joe Barri on the Boardwalk; he was introduced as Mr. Vicari. He again saw Barri that evening at the appellant's home, at which time the appellant and Tocco were among the persons present (Tr. 29-30).

On July 26, 1944 Tocco and Barri rented a cabin near Felton in the Santa Cruz Mountains where they remained until August 6, 1944 (Tr. 30).

Agent Pocoroba has a son who is a pilot in the Army Air Forces.

Early in August the Agent had a conversation with Maugeri about his son operating an airplane. The appellant asked Pocoroba if his son could fly out of the country. The Agent said he didn't know but would find out. The next day Pocoroba told Maugeri that he had spoken to his son over the telephone and that his son would be allowed to fly to Canada and to Mexico. Maugeri stated that it would be a good chance for him to fly his plane to Mexico and get a load of opium and bring it into this country (Tr. 30).

On August 8, 1944 Pocoroba had dinner at the appellant's home at which time Tocco and Barri were present. After dinner these three went to the Agent's cabin.

The next day, August 9, Maugeri drove Tocco and Barri to San Francisco in his car.

On August 10, 1944 Pocoroba met Maugeri at his concession at about 9:00 o'clock in the evening. Maugeri asked him if either Tocco or Barri returned to Santa Cruz could be accommodate them in his cabin. He said that he could (Tr. 32).

When Pocoroba returned to his cabin that evening, Barri was already there.

On August 10, 1944 at about 11:00 in the evening, Maugeri came to Pocoroba's cabin; Joe Barri was there at the time.

The witness testified (Tr. 33):

> "At that time Joe Barri told Sam Maugeri that he had been followed while in San Francisco, and he said, 'That is not the proper thing to do, to take me to a strange city, put me on a hot spot and let the police look me over'. Sam Maugeri answered that he was crazy, that he did not know what he was talking about, that he had taken him among friends, and that nobody had followed him. Joe Barri then told Maugeri—he said, 'Listen, I am from New York, and I know when I am being followed. You don't have to tell me.' He said, 'Furthermore, what good did it do bringing the grips into your friend's house when he wouldn't give me permission to load the stuff?' Maugeri replied that he had been in too much of a hurry, that he was nervous and excited, that there would have been other ways of loading the stuff. Maugeri then said, 'I had the man bring the stuff in San Francisco, and from San Francisco he has to bring it here'. Barri told him, he said, 'Well, we don't do business like this in New York. Whenever we have a stranger in New York for business purposes we always look after his safety'. Maugeri then left the cabin, and Barri remained all night with me."

Pocoroba did not see Tocco on that evening but saw him the next evening, August 11, 1944, when Tocco came to his cabin with a brown leather suitcase, a black Gladstone and a blue canvas hand bag (Tr. 34).

Tocco came to the cabin about 9:00 o'clock that evening. Barri was already there and they slept in the cabin that night. On the following morning, Saturday, August 12, 1944, Maugeri came to the cabin

shortly after 9:00 o'clock. The witness testified (Tr. 34-35):

"A conversation took place, at which Maugeri, Tocco, Barri and myself were present. At that time Maugeri told Barri, 'The man is here again and I have already given him the money. Now, it is entirely up to you. You take the stuff or they will dump it in the ditch.' At that time Barri said, 'I don't know how you people do business in California'. He said 'Where do you expect me to pack this stuff, in the street? Your friend in San Francisco won't give me permission to pack it in his house; you won't give me permission to pack it in your house. What am I to do?' Maugeri then got up and said 'I am going to work. Think it over and let me know.' Maugeri then left the cabin shortly after 9:00 o'clock on that morning. About 5:00 o'clock in the afternoon of that same day Joe Tocco was in my cabin, and he asked me for permission to pack the opium in my place. I agreed. Tocco then left the cabin, and returned in about ten or fifteen minutes. Barri was in the cabin with me at the time Tocco returned. The cabin consists of a combination living and bedroom, a kitchen and a bathroom. In the combination living and bedroom were two beds, a double bed and a single bed. On the previous night Tocco and Barri had occupied the double bed and I had occupied the single bed. After 11:00 o'clock on Saturday evening, August 12th, Joe Tocco and Joe Barri and myself being present, Maugeri came into the cabin carrying a pasteboard box covered by newspaper. He gave it to Tocco, who put it on the floor. Maugeri then went away and came back a few minutes later with another box about the

same size, also wrapped in newspaper, and Tocco received it. I then mixed a drink and gave it to Sam Maugeri. He drank it in a hurry and went away. Maugeri had no conversation with Tocco or Barri at this time and place. When Maugeri left he said to Tocco, 'I will pick you up at 5:00 o'clock'."

After Maugeri left, Tocco took the tan suitcase (Gov't's. Ex. 1 for Identification) from under the bed, opened it and took out some brown colored wrapping paper and some paper tape. He also produced a small scale and Barri weighed each can of opium while Tocco marked down the weight. They wrapped the cans of opium into bundles with the brown wrapping paper and tied them with gummed paper tape and then put the bundles in the brown leather bag and the blue overnight bag. They finished weighing the cans around 1:00 o'clock Sunday morning, August 13th. Pocoroba stated that the cans which they wrapped were the ordinary 5-tael cans in which opium is usually packed (Tr. 37).

Pocoroba retired about 1:00 o'clock and Barri and Tocco at 2:00 o'clock. At about 3:30 o'clock someone rapped on the door.

The witness testified (Tr. 38):

"At about 3:30 somebody rapped at the door and Joe Tocco went to the door and opened it, and Sam Maugeri said, 'Let's get the grips and let's go'. Tocco was dressed; he hadn't undressed for the night, but he had taken his shoes off. Tocco then took the brown leather suitcase, Government's Exhibit 1 for Identification, and the

blue overnight bag, Government's Exhibit 2 for Identification, and left the cabin. Barri and I remained in the cabin."

The witness then identified Government's Exhibits 3 and 4 in evidence, two carboard boxes as the two boxes brought into his cottage by Sam Maugeri with the opium on the night of August 12, 1944, stating that he had put identifying marks on the boxes (Tr. 38).

Pocoroba and Barri arose at about 8:30 o'clock in the morning and later took a taxi to the bus station. Pocoroba left Barri there at about 11:00 o'clock on that Sunday morning and has not seen him since (Tr. 38).

Upon leaving Barri, Pocoroba endeavored to contact some of his fellow officers in Santa Cruz by telephone but was unsuccessful. He saw and conversed with Maugeri at about 11:30 o'clock that morning. He later met Agent Newman and other Agents and reported what had happened. He later went to the Oakland Mole in an effort to find Tocco on a train leaving for the East but did not find him. He left San Francisco for Santa Cruz, arriving there between 1:00 o'clock and 2:00 o'clock in the morning of August 14, 1944. He went to his cabin where he found several fellow officers awaiting him and delivered the two cardboard boxes with the traces of opium in them, the brown wrapping paper and the brown gummed paper tape (Government's Exhibits 3, 4, 5 and 6) to Agent McGuire (Tr. 39). He stated that the paper and the tape had been left in his cabin

by Tocco and Barri after they had used the portion they needed to wrap the cans of opium (Tr. 40).

On Wednesday afternoon August 16, 1944, Pocoroba returned to Santa Cruz where he met Maugeri at his concession about 4:00 o'clock in the afternoon and had a conversation with him.

The witness testified (Tr. 42):

> "I asked if he heard from the boys, and he said, 'No' and he said 'If I don't hear from them again I would be glad. They are certainly lousy, Joe Tocco was introduced to me by a friend of mine and the others were lousy'. And I asked him where he took Joe Tocco and he said to Berkeley."

The witness's story was unshaken on cross-examination and he reiterated that it was Maugeri who first mentioned the subject of narcotics in their conversations. The witness stated (Tr. 48):

> "It was on the 6th of June, 1944, that Maugeri started talking to me about narcotics, which was about a month after I had first met Maugeri. The subject started when Maugeri said he had been convicted for counterfeiting in 1935 and that the counterfeiting racket was lousy, the only ones that made money are the ones that print the money. He said he would sooner deal in narcotics than in counterfeit money. At that time our files showed Maugeri's criminal record, and I had known of Maugeri's record before he told me. Maugeri was the first one to mention narcotics, and I don't know what brought it about; it was just daily association, as naturally you do when

two oldtimers get together, and as I thought it was my duty to talk about rackets while here working on this Maugeri case."

He further testified (Tr. 53):

"On the night of August 9th, when I got to my cottage and found Barri there, Barri was so nervous he was not able to go out, he was afraid to go out the door, so he asked me to go to Sam Maugeri to get in touch with somebody in San Francisco to see that Tocco got safely back to Santa Cruz. Maugeri gave me a telephone number to call, which was a saloon at 1371 Grant Avenue. Maugeri was too busy working at the concession at the time and did not have an opportunity to phone, himself. The reason that Mr. Barri wanted to phone to Tocco in San Francisco was to tell him to bring the suitcases back."

On redirect examination the witness corrected himself and gave the correct date of this incident as August 10th and not August 9th as he had stated on cross-examination.

The witness repeated his testimony that Maugeri brought the cardboard cartons into the cabin (Tr. 55) and that the cans of opium which Tocco and Barri wrapped and placed in the luggage, came from these cartons (Tr. 59). He also testified that the cartons contained traces of opium which had leaked from the cans and that these traces were still in the cartons at the time they were offered in evidence at the trial (Tr. 59-61).

On cross-examination in answer to questions by appellant's counsel, he also stated that Barri came to

Santa Cruz with $22,000 which he gave to Maugeri for the purchase of the opium. (Tr. 61).

On redirect examination Agent Pocoroba related the following conversation had with Maugeri on August 16th (Tr. 73):

> "I told him I was going home and I would like to take ten cans of opium with me, and Maugeri said, 'It is not my policy to do that kind of a business, but I will do it for you, but it will take about a week before I can get it.' "

Pocoroba also testified on redirect examination that on the night of August 10, 1944, in his cabin, Barri told him that he had given Sam Maugeri $22,000 in $1000 and $500 bills for the purchase of 105 cans of opium, and that he had been followed by detectives in San Francisco and had no intention of doing any business (Tr. 74).

He further testified that on the same night, August 10, 1944, Barri told him to go to Maugeri's concession and tell Maugeri to call somebody in San Francisco and see that Tocco got safely in Santa Cruz and to his place. He went to Maugeri, related the message, and Maugeri gave him a number which was the number of a saloon on 1371 Grant Avenue, conducted by a man named Pete Scambellone; that he, Pocoroba, telephoned this saloon, that Tocco was not there and that he left a message for him to come to his cabin as soon as he got back (Tr. 75-76).

He further testified that Tocco and Barri obtained the cans of opium that they put in the suitcases from

the two boxes that Sam Maugeri delivered to the cabin (Tr. 76).

He repeated his testimony given on direct examination that on the evening of August 12, 1944, when Maugeri was leaving the cabin, after having deposited the two cardboard boxes there, he told Tocco he would return at about 5:00 o'clock in the morning. That when, at about 3:30 o'clock the following morning a knock sounded on the door and a man's voice said "Get the grips and let's go", "it sounded like Maugeri's voice." "I recognized it as Maugeri's voice" (Tr. 77). "There wasn't any doubt in my mind that it was Maugeri's voice" (Tr. 80).

On recross examination the witness testified that he had a conversation with Maugeri in which he asked him to get him ten cans of opium to which Maugeri replied that it was not his policy to deal in small amounts, but that he would do it for him for a price of $225 a can (Tr. 78).

Peter Scambellone (Tr. 81-83), testifying for the Government, stated that about Wednesday, August 9, 1944, Salvatore Maugeri called at his saloon at 1371 Grant Avenue and asked permission to leave two suitcases, belonging to a friend, in his home. He gave him the key and a taxi driver picked up the suitcases and took them to his home. He claimed he did not see the suitcases in his home and could not identify Government's Exhibits 1 and 2 for Identification, although he stated that one of the pieces of baggage was ". . . a big bag like that", identifying Government's Exhibit

1 for Identification. He thought the baggage remained in his home a couple of days and didn't remember when they were taken out. He claimed that neither Maugeri nor Tocco went to his house that day; that Tocco did not phone him at his home as he had no telephone there and that the keys to his home were returned to him about five minutes after they had been received by the same taxi driver.

He contradicted himself in one instance, first saying that Tocco and Barri were present in the saloon with Maugeri but later denied that he knew them (Tr. 82-83).

John Saccocci (Tr. 84-85), testifying for the Government, stated that he was a taxi-driver by occupation and that he had known the appellant for sixteen or eighteen years. That on a day, the exact date of which he could not remember, he met Maugeri in Scambellone's saloon and, at the appellant's request, took some suitcases to Scambellone's home. He removed the suitcases from appellant's automobile and took them to Scambellone's home, the key to which had been given him by Maugeri. The suitcase and bag were light and appeared to him to be empty.

Burhl B. Harwood (Tr. 85-86), testifying for the Government, testified that he was a clerk in the Bowman-Forgey Stationery Company in Santa Cruz. That on August 8, 1944, he sold a considerable amount of brown wrapping paper and gummed paper tape to two men, whom he described. He stated that Government's Exhibits Nos. 5 and 6 in evidence appeared

to be a portion of the brown wrapping paper and gummed paper tape which he sold on that occasion. That he did not make more than one sale of that wrapping paper on that day.

Henry B. Hayes (Tr. 86-97), testifying for the Government, testified that he has been a Federal Narcotics Agent since 1936. That on August 8, 1944, he followed Joseph Tocco and Joe Barri from the residence of Sam Maugeri to the Bowman-Forgey Stationery Store on Pacific Avenue in Santa Cruz. That Mr. Harwood, the clerk, told him they had purchased some brown wrapping paper and gummed tape and looked at a postal scale which they did not purchase.

He testified that before that time he had been engaged in the surveillance of Maugeri in Santa Cruz, together with other Federal Agents; that except for intervals of three or four days at a time he was in Santa Cruz continuously from March 2nd to about August 13, 1944. During this time he saw Pocoroba in the company of Maugeri on many occasions;—saw him enter Maugeri's home, meet him at his concession, travel in his automobile and attend theatres.

He also stated that he knew Joe Tocco and had seen him in the company of Pocoroba on more than one occasion; that Tocco was living at Maugeri's home and that he saw them together on several occasions. He also saw Barri in Maugeri's company on more than one occasion. He saw Maugeri visit the cabin of Tocco and Barri in Felton and on July 28th or 29th saw Maugeri drive them to his home in Santa Cruz

where they unloaded their baggage and took it into the house.

On August 9, 1944, the witness, accompanied by Customs Inspector Gleason, followed Maugeri's car to San Francisco. Maugeri was driving and Tocco and Barri were his passengers. They stopped on 24th Street and Maugeri entered a building. They then drove to Geary Street between Powell and Stockton Streets and Barri proceeded to Scambellone's saloon on Grant Avenue which they entered. He saw Tocco there later. He looked into Maugeri's parked car and saw a tan suitcase and black handbag therein. He saw Maugeri talking to a taxi driver and saw the latter remove the bags and take them to 1644 Grant Avenue where he brought them into a house.

At about 5:30 the witness and another Agent followed Maugeri in his automobile to the Bayshore Highway where he drove south. He later saw Tocco and Barri at Scambellone's saloon, then saw Tocco at the Telenews Theatre and still later at the Whitcomb Hotel. Barri was with him at the Whitcomb Hotel about midnight.

The next day, August 10, 1944, he followed Tocco from the Whitcomb Hotel to Scambellone's saloon. At about noon he again followed Tocco and Barri from the Whitcomb Hotel to the Greyhound Bus Station at Fifth and Mission Streets and then to the vicinity of Scambellone's saloon. Barri did not enter the saloon but stood on the street corner watching Tocco as he did so. Barri then walked rapidly to a

theatre which he entered, remaining about ten minutes. He emerged without his hat, walked to a street car which he boarded. Barri kept watching behind him and looking up and down the street. He appeared to have observed someone. He saw him later at the bus station at Fifth and Mission Streets where he boarded a bus around 5:20 o'clock. The witness became ill and did not participate in the investigation after August 10, 1944.

Jess Braly (Tr. 98-108), testifying for the Government, stated that he was a United States Customs Patrol Inspector. He arrived in Santa Cruz on May 5, 1944, and conducted a surveillance of Maugeri, Tocco, Barri and Pocoroba. He saw various members of this group together on many occasions. He corroborated Agent Hayes' testimony as to the activity of the defendants on the day of their trip to San Francisco on August 9, 1944, with the added particular that when Maugeri's car stopped on Geary Street he saw Tocco get out and he followed him to the Santa Fe ticket office where he remained for about twenty-five minutes. He corroborated Agent Pocoroba's testimony as to the particulars of finding the cardboard boxes, wrapping paper and tape in the cabin.

On redirect examination (in answer to a question designed to pursue a topic opened up on cross-examination) the witness testified that the reason he and the other Agents were not watching Pocoroba's cabin on the night of August 12th and the early morning of

August 13th—when Maugeri delivered the opium and later called for Tocco in his car—was because Pocoroba had told them that Barri was frightened and was afraid the law was following him and they did not wish to make him suspicious.

Emmet Gleason, Customs Patrol Inspector (Tr. 108-109), testifying for the Government, corroborated Agents Hayes' and Braly's testimony concerning the general surveillance of the defendants in Santa Cruz and in particular the circumstances of the trip to San Francisco on August 9th and the visit to Scambellone's saloon, and the moving of the grips from Maugeri's car to Scambellone's home.

Thomas E. McGuire, Agent of the Federal Bureau of Narcotics (Tr. 109-121), testifying for the Government, corroborated the other witness' testimony concerning the activities of the defendants on August 9th at Scambellone's saloon, with the additional testimony that, on that morning, he saw Maugeri enter Scambellone's residence at 1644 Grant Avenue and saw Tocco and Barri enter there about 9:00 o'clock in the evening and remain about ten minutes. They did not have the luggage with them when they left.

He further testified that on Sunday, August 13th, he observed a Chevrolet automobile enter Maugeri's driveway between 9:15 and 9:30 in the morning. He corroborated the testimony concerning finding the boxes, wrapping paper and tape in the cabin. He initialed the cartons and kept custody of all of this evi-

dence until he delivered them to the custodian in the office of the Federal Bureau of Narcotics.

Vance Newman, Agent of the Federal Bureau of Narcotics (Tr. 121-151), testifying for the Government, corroborated the other witnesses' testimony concerning the general surveillance of the defendants and testified that he saw two or more of them together and with Pocoroba on many occasions. He also corroborated the other witnesses' testimony concerning the trip to San Francisco and the moving of luggage from Maugeri's car to Scambellone's home.

He further testified that on Sunday, August 13, 1944, he saw Pocoroba, and in the company of other agents had a conference with the District Supervisor of the Bureau of Narcotics, Mr. Manning. He and the other agents went to the Oakland Mole and made a search of trains. They returned to Santa Cruz and went to Pocoroba's cabin. He initialed the cartons found there.

He left by plane from San Francisco on Monday, August 14, 1944, at 6:00 P. M. for Chicago. The witness testified:

> "On the morning of August 16th I went to the Chicago-Northwestern Railroad Station at Chicago accompanied by Agent Walsh, from the office of the Bureau of Narcotics. We went there about seven o'clock in the morning. We watched the incoming trains and observed the people coming in, or getting off those trains. Those trains were coming from the West. I saw Tocco on that morning. He arrived on train No. 28, which was

due in at 8:30, but it did not get in until 9:15 a. m. It came in in two sections. I saw him get off the second section of that train. That train came from San Francisco. I saw Tocco leave the second section of that train and carrying a blue cloth bag, that is Exhibit 2, and I followed him. He walked down to the main level of the station. He stood there at the place where the baggage is delivered, and about fifteen minutes later the baggage trucks were pushed up. He claimed the large yellow suitcase, which is Government's Exhibit No. 1, and when he had both pieces of luggage he called for a cab, and then Agent Walsh and I placed him under arrest. When we placed him under arrest we took possession (106) of those two pieces of luggage, the cloth overnight bag and the tan suitcase. We went to the Chicago office of the Federal Bureau of Narcotics. I got the keys to open the suitcase from Tocco, I opened the blue bag right there in the station. It was locked. Tocco gave me the key'' (Tr. 126-127).

The witness further testified:

"I opened the small bag in the station. It was there by some freight elevators. I led him away from the place where the crowd was to a place about fifteen or twenty yards from there, in front of some elevators on the ground floor of the station. In the bag I found some cans of opium. They were wrapped in brown paper and sealed with brown paper tape. There were about twenty cans in the small blue overnight bag. I opened the tan suitcase when I got to the office of the Bureau of Narcotics. I found 75 cans of opium and found a package of opium weighing a little

over eight ounces, and I found eight ounces of morphine in a sugar box in the tan suitcase" (Tr. 128).

He brought the opium back to San Francisco and delivered it to Mr. Mallory, a Government chemist. It was the opium which was offered in evidence.

George E. Mallory (Tr. 151-154), testifying for the Government, testified that he is a chemist employed by the United States Treasury Department, that he examined Government's Exhibits 8 and 9 for Identification and made an analysis of their contents and found it to be opium. He further stated that the two cardboard cartons, Government's Exhibits 3 and 4 in evidence, contained smoking opium "sticking all over the box" (Tr. 152).

Government's Exhibits 1, 2, 8 and 9 for Identification were received in evidence.

Salvatore Maugeri (Tr. 158-188) testifying in his own behalf, testified that he was convicted of counterfeiting in 1935 and served two years in a federal penitentiary: that of the automobiles mentioned in the case, the Oldsmobile belonged to his son, the Chevrolet belonged to his nephew, the Pontiac also belonged to his son. He testified that he met and became friendly with a man named Lagaipa who introduced him to Tocco, that Tocco lived at his house for a couple of weeks, that he did not charge him any rent. He left and came back in July and stayed at Maugeri's home for about a month. He met Barri through Tocco, and Barri also lived at his home. He became quite friendly

with them. On one occasion he drove them to San Francisco with some grips. He took them to Scambellone's bar and they asked if they could leave their grips there until they got reservations to go East.

He admitted knowing Pocoroba under the name of Benny Vicari. They became quite friendly. Pocoroba talked about narcotics but he did not pay any attention because he didn't like it (Tr. 167). He denied knowing that Tocco, Barri and Lagaipa had anything to do with narcotics. He read a letter which Pocoroba received from Chicago a couple of times but didn't pay any attention to it. They talked about narcotics once in a while but he never discussed it because he had nothing to do with it. After his trip to San Francisco with Tocco and Barri, Tocco phoned him and asked if he had seen Barri, that "he was worrying about what happened to him" (Tr. 169). He told Pocoroba about this call and told him if he saw Barri to let Tocco know. He admitted being in Pocoroba's cabin on Saturday night, August 12, 1944, at about 11:00 or 11:30 o'clock but denied having any conversation about narcotics. He claimed he went there for a drink. When he arrived he saw Tocco and Barri outside the cabin and they had "some kind of box" (Tr. 171), but that he didn't pay any attention to it. They all went inside, he stayed about ten minutes and then went back to work at the concession. He left there at about a quarter to two o'clock, went home and to bed and did not arise until about 7:00 or 7:30 Sunday morning. He went back to the concession and at about 9:00 o'clock returned to his home in a Chevrolet

car. He denied going to Pocoroba's cabin at 3:00 or 3:30 o'clock Sunday morning and stated that when he left there Saturday evening he said "Maybe I see you boys tomorrow" (Tr. 174). On Wednesday just prior to his arrest he had a conversation with Pocoroba about ten cans of dope and in answer to Pocoroba's request to get it for him, stated "I don't need no help, I got no dope." "I haven't got it" (Tr. 174).

On cross-examination he stated that when he went to the cabin on Saturday night he went in before the boxes were brought in, that both Tocco and Barri carried a box, that he did not ask what was in them and didn't pay much attention. He denied having any conversation with Pocoroba or Tocco then and stated that neither Tocco nor Barri told him they were leaving in the morning.

He stated that Tocco had been in Santa Cruz on two occasions before this, in November, 1943, and March or April of 1944. Both times he stayed at appellant's home. The second time he did not charge him rent—"He was a friend" (Tr. 177). On this last occasion Tocco came to his home in July; he again did not charge him rent. Tocco told him he was in the wholesale fish business in the East. He was introduced to Barri by Tocco. Tocco's baggage resembled that which was in evidence.

On the way to San Francisco Tocco and Barri asked him if he knew someone who would keep their suitcases while they made reservations. He asked Scambellone.

He stated he asked Pocoroba if Tocco and Barri could stay in his cabin after their trip from San Francisco because he did not have room as some friends were staying over the week-end. He didn't remember whether Barri returned on Thursday night and Tocco on Friday night (Tr. 181).

QUESTIONS.

1. *Do Counts One and Two of the indictment state but one offense or do they recite separate and distinct offenses punishable as such?*

2. *Is the evidence sufficient to support the verdict?*

3. *Will the Appellate Court consider the sufficiency of the evidence when a motion for a directed verdict, made at the close of the plaintiff's case, and overruled, is not renewed at the close of the entire case?*

ARGUMENT.

1. **COUNTS ONE AND TWO OF THE INDICTMENT STATE SEPARATE AND DISTINCT OFFENSES PUNISHABLE AS SUCH.**

This point was definitely settled by this Honorable Court in the case of

Gargano v. United States (CCA-9, 1944), 140 F. (2d) 118.

In that case, as in this, the defendant was charged in one count with concealing and facilitating the conceal-

ment of narcotics, and in the second count with facilitating the transportation of the same narcotics. In that case, as in this, the two offenses arose out of the same transaction and occurred on different dates. The Court held that the indictment, based on the Jones-Miller Act (21 U.S.C. 174), stated two separate and distinct offenses punishable as such. The *Gargano* case is on "all fours" with the instant case.

In so deciding the Court followed the well-established rule laid down in

> *Parmagini v. United States* (CCA-9), 42 F. (2d) 721, 724, 725, certiorari denied, 283 U. S. 818,

which held that the concealment and sale of narcotics under the Jones-Miller Act (21 U.S.C. 174) are distinct offenses although both occur in connection with a single transaction.

This rule was reiterated in

> *Palermo v. United States* (CCA-1), 112 F. (2d) 922

where it was held, under the same Statute, that importing and bringing in of narcotics and the concealment of the same are distinct violations.

The same Court in

> *Silverman v. United States,* 59 F. (2d) 636, certiorari denied, 287 U. S. 640

held that sale and concealment of narcotics are separate and distinct offenses and specifically held that conviction on counts charging sale and concealment separately, does not constitute double jeopardy.

Although the offenses charged in Counts One and Two related to and grew out of one transaction, nevertheless two offenses are defined by statute and the proof in Count Two is different from that in Count One.

The above rule is restated in *Hunt v. Hudspeth,* (CCA-10), 111 F. (2d) 42, at page 44, as follows:

> "Congress may make separate steps in a single transaction distinct and separate offenses. Burton v. United States, 202 U.S. 344, 26 S. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362; Casebeer v. United States, 10 Cir. 87 F. (2d) 668; Slade v. United States, 10 Cir. 85 F. (2d) 786.
>
> "The test as to whether a single transaction may constitute two separate and distinct offenses is whether the same evidence is required to sustain each charge. If not, then the fact that both charges relate to and grow out of one transaction does not make only a single offense where two distinct offenses are defined by the statute."

See also,

Walsh v. White (CCA-8), 32 F. (2d) 240,

where it was held that the offenses of purchase, possession and sale of the same quantity of morphine are separate and subject to separate penalties.

See also

Yep v. United States (CCA-10), 81 F. (2d) 637, reversed on other grounds, 83 F. (2d) 42.

2. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT AND JUDGMENT.

We cannot believe that appellant seriously contends that the evidence in this case is insufficient to support the verdict. If Agent Pocoroba's testimony, corroborated as to numerous physical facts by the testimony of other Federal Narcotic Agents and Customs Agents, was believed, there can be no doubt that the evidence was more than sufficient to support the verdict.

When the appellant delivered the two cartons of opium to the defendants Tocco and Barri in Agent Pocoroba's cabin he had committed the offense of concealing and facilitating the concealment of opium. When in addition to this, on the following morning, he drove the defendant Tocco in his automobile, presumably to board the train taking him to Chicago, he committed the separate offense of facilitating the transportation of opium. It is to be remembered also that the appellant admitted to Pocoroba that he drove Tocco to Berkeley and that his car was seen entering his home at 9:00 A. M. Sunday morning.

Following the reasoning of this Honorable Court in

Pon Wing v. United States (CCA-9), 111 F. (2d) 751, 758,

the appellant certainly made the transportation of the narcotics "less difficult". In that case the Court said:

> "Anything done to make the continuance of the trip 'less difficult' would constitute facilitation of its transportation. Since the term 'facilitate' seems not to have any special legal meaning, the

> framers of this statute must have had in mind the common and ordinary definition as expressed by a standard dictionary. Quoting from Webster's Unabridged Dictionary, 'facilitate' is defined as follows: 'To make easy or less difficult; to free from difficulty or impediment; as to facilitate the execution of a task.' "

The fact that the appellant might also have been guilty of transporting the opium under the Harrison Narcotic Act (26 U.S.C. 2553 and 2557) is immaterial. He was not so charged and we are concerned here only with the fact that he facilitated its transportation.

In *United States v. Cohen* (CCA-2), 124 F. (2d) 164, certiorari denied, 315 U.S. 881, Rehearing denied 316 U.S. 707, the Court held that in a prosecution of four defendants for concealing and facilitating the transportation of morphine it was not necessary that each of the defendants have the narcotics but only that one or more of them had possession while the other aided in the illicit transaction to which the possession was incidental.

3. **THE APPELLATE COURT WILL NOT CONSIDER THE SUFFICIENCY OF THE EVIDENCE WHEN A MOTION FOR A DIRECTED VERDICT MADE AT THE CLOSE OF THE PLAINTIFF'S CASE AND OVERRULED IS NOT RENEWED AT THE CLOSE OF THE ENTIRE CASE.**

Under federal practice an Appellate Court will not consider the sufficiency of the evidence in the absence of a request for an instructed verdict.

Kennedy Lumber Company v. Brickbory, 40 F. (2d) 228;

Hansen v. Boyd, 161 U. S. 397.

Error, if any, in overruling a motion to direct a verdict at the close of ~~defendant~~ plaintiff's case is not reviewable where the motion was not renewed at the close.

U. S. v. Salmon, 42 F. (2d) 353;

Wilson v. Haley Livestock Co., 153 U. S. 39.

The introduction of evidence by the accused in his own behalf is a waiver of previous motions for an instructed verdict.

Simpson v. United States (CCA-8 1911), 184 Fed. 817;

Stearns v. United States (CCA-8, 1907), 152 Fed. 900;

Burton v. United States (CCA-8, 1907), 142 Fed. 57.

This ruling applies to criminal as well as civil cases.

Leyer v. United States (CCA-2, 1910), 183 Fed. 102.

The record shows that a Motion for a Directed Verdict was not made by appellant at the close of appellant's case.

CONCLUSION.

For the reasons stated we respectfully submit that the decision of the lower Court should be affirmed.

Dated, San Francisco,
June 25, 1945.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,

JAMES T. DAVIS,
Assistant United States Attorney,

Attorneys for Appellee.

No. 10,939

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SALVATORE MAUGERI, *Appellant,*
vs.
UNITED STATES OF AMERICA, *Appellee.*

APPELLANT'S CLOSING BRIEF.

LEO R. FRIEDMAN,
Russ Building, San Francisco 4,
SOL A. ABRAMS,
Kohl Building, San Francisco 4,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 10,939

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SALVATORE MAUGERI,	*Appellant,*
VS.	
UNITED STATES OF AMERICA,	*Appellee.*

APPELLANT'S CLOSING BRIEF.

The United States has filed herein a brief purporting to answer the points raised by appellant. In doing so the United States has substituted its own question for the first question raised by appellant.

The first question raised by appellant was that "The double jeopardy clause of the Fifth Amendment to the Constitution was violated by the verdicts finding appellant guilty on Counts 1 and 2 of the indictment and by the court ordering the sentences pronounced on each of said counts to run consecutively."[1]

The United States substitutes for this question one of its own, worded as follows: "Counts One and Two

[1]Appellant's Opening Brief, p. 22.

of the indictment state separate and distinct offenses punishable as such.'"[2]

We concede that, under proper circumstances, the concealment and facilitating the concealment of opium may be a separate and distinct offense from the facilitating the transportation of opium, and such offenses may be charged in two counts of an indictment and punished separately.

Appellant's contention is that the evidence established but one continuous unbroken transaction and that the acts alleged as constituting the first count of the indictment were proven to be but incidental to the offense alleged in the second count. The question presented is primarily one of evidence and not of pleading.

Having called this matter to this Court's attention we will discuss the authorities cited by the United States in the order in which they appear in the Government's brief.

---

1. **THE ORDER DIRECTING THE SENTENCES TO RUN CONSECUTIVELY CONSTITUTES DOUBLE PUNISHMENT AND DOUBLE JEOPARDY FOR THE SAME OFFENSE.**

First the Government cites the case of *Gargano v. United States* (CCA-9), 140 F. (2d) 118, as holding that *an indictment,* charging in count one the concealing and facilitating the concealment of narcotics and in count two the facilitating the transportation of narcotics, states two separate and distinct offenses

---

[2]Brief for Appellee, p. 24.

punishable as such.[3] It should be noted that the Government has transposed the two counts of the Gargano indictment as appears from the decision of this Court (p. 19) as follows:

> "Count 1 charged that appellant, on or about July 7, 1937, * * * facilitated the transportation of a certain lot of morphine * * *. Count 2 charged that appellant, on or about July 8, 1937 * * * concealed and facilitated the concealment of the same lot of morphine. Obviously these counts charged distinct offenses."

Clearly, transportation *followed* by concealment presents a far different situation from concealment *incidental* to transportation. In the first instance the offense of transportation has been completed before the concealment begins; in the second instance, the concealment and transportation are part of the same transaction.

The case of *Parmagini v. United States* (CCA-9), 42 F. (2d) 721, does not support the Government's position. In fact, we cited this case as an authority in support of appellant's position.[4] In the *Parmagini* case several offenses were charged. This Court held as follows: (a) The concealment and sale of opium were separate offenses; (b) selling morphine and distributing morphine at the same time were but one offense; (c) concealment of morphine and opium were but one offense. This Court pointed out that where one act is an incident to an ultimate act, but one offense has been committed.

---

[3]Brief for Appellee, pp. 24-25.
[4]Appellant's Opening Brief, p. 32.

In *Palmero v. United States* (CCA-1), 112 F. (2d) 922, there was neither raised nor involved the question of double punishment. The sole question was whether an importing of opium could occur before the opium was unloaded from the ship. The Court held that both the importing and bringing in of opium was complete when the ship entered the territorial waters of the United States.

The case of *Silverman v. United States,* 59 F. (2d) 636, involved a situation where the indictment charged sale and distribution under the Harrison Narcotic Act and concealment under the Jones-Miller Act. The Court held the charges to be distinct offenses. There is nothing in the opinion to show the time elements involved. The concealment may have long antedated the sale. If this case be construed in the manner contended for by the United States, then it is directly opposed to the cases cited on pages 29 to 36 of appellant's opening brief. The same criticism applies to the case of *Walsh v. White* (CCA-8), 32 F. (2d) 240.

In *Yep v. United States* (CCA-10), 81 F. (2d) 637, defendant was acquitted on a count charging purchase and convicted on a count charging sale. The Court properly held that the acquittal was no bar to the conviction.

The Government has failed to comment on or distinguish any of the cases cited by appellant and the cases relied on by the Government do not support its position.

Maugeri's act was but one act, the concealment was but incidental to the transportation. The trial Court's

direction that the sentences run consecutively constituted double punishment and violated the Fifth Amendment.

---

2. INSUFFICIENCY OF THE EVIDENCE TO SUPPORT COUNT 2 OF THE INDICTMENT.

In an attempt to meet our argument under this heading, the Government argues as follows:

> "When appellant delivered the two cartons of opium to the defendants Tocco and Barri in Agent Pocoroba's cabin he had committed the offense of concealing and facilitating the concealment of opium. When in addition to this, on the following morning, he drove the defendant Tocco in his automobile, presumably to board the train taking him to Chicago, he committed the separate offense of facilitating the transportation of opium. It is to be remembered also that appellant admitted to Pocoroba that he drove Tocco to Berkeley and that his car was seen entering his home at 9:00 A. M. Sunday morning."[5]

The foregoing statement is erroneous in its facts, conclusions and the law.

From the manner in which the foregoing statement is worded one would gather the impression that there was ample testimony to establish (a) that appellant drove Tocco in his automobile and (b) that *in addition thereto* appellant admitted that he drove Tocco to Berkeley. Such is not the fact. The only evidence on this point is Pocoroba's testimony that on August

---

[5]Brief for Appellee, p. 27.

16th he returned to Santa Cruz and had a conversation with Maugeri as follows:

> "Mr. Hennessy. Q. What conversation did you have, if any, with Maugeri?
>
> A. I asked if he heard from the boys, and he said 'No', and he said, 'If I don't hear from them again I would be glad. They are certainly lousy. Joe Tocco was introduced to me by a friend of mine, and the others were lousy.' *And I asked him where he took Joe Tocco and he said to Berkeley.*"[6]

The foregoing is the only testimony in the record showing that Maugeri had anything to do with the matter after he left Pocoroba's cabin at about 11:00 P. M. on August 12th or when he knocked on the cabin door (if he did knock) at 3:30 A. M. on August 13th.

There is nothing in the record to show that the conversation between Pocoroba and Maugeri on August 16th referred to the morning of August 13th. So far as the record is concerned Maugeri may have been referring to a date much earlier than August 12th or 13th when he said he drove Tocco to Berkeley. The record does show that he drove to San Francisco—probably elsewhere—on several occasions prior to August 12th.

Whether Maugeri did or did not make such statement to Pocoroba is immaterial for the reason that *extrajudicial statements, admissions or even confes-*

---

[6]T.R. 41-42.

sions of a defendant are incompetent to prove the corpus delicti of the offense with which he is charged.

The *corpus delicti* of the offense charged in the second count of the indictment is not the *transporting* of opium, but is the *facilitating* of the transportation of opium.[7] There is no evidence in the record, other than the claimed admission made by Maugeri, that even tends to establish that anything was done to *facilitate* any transportation.

It is fundamental that the *corpus delicti* must be established by evidence other than the extrajudicial statements, admissions or confessions of a defendant.

Ryan v. United States, 99 Fed. (2d) 864;
Goff v. United States, 257 Fed. 294.

It is equally well settled that an extrajudicial statement or confession cannot be considered in determining the sufficiency of the evidence to support a conviction *unless the corpus delicti is established by evidence independent of the extrajudicial admission or confession.*

Wynkoop v. United States, 22 Fed. (2d) 799;
Mangum v. United States, 289 Fed. 213;
Daeche v. United States, 250 Fed. 566;
Flower v. United States, 116 Fed. 241.

Eliminating the admission of Maugeri, as testified to by Pocoroba, there is absolutely no evidence in the record to show that anyone, let alone Maugeri, *facilitated* the transportation of the opium in question.

---

[7]The transportation of opium is a violation of the Harrison Narcotic Act and is not a violation of the Jones-Miller Act. Appellant herein was not charged with transporting opium or aiding and abetting another to transport opium.

Thus, the evidence, for the foregoing reasons and those urged in appellant's opening brief, is wholly insufficient to support the second count of the indictment.

---

3. THIS COURT CAN AND SHOULD CONSIDER THE INSUFFICIENCY OF THE EVIDENCE.

The Government urges that because a motion for directed verdict was not made by appellant, at the close of all the evidence in the case, the Court will not look into the sufficiency of the evidence.

Several cases are cited in support of this contention and we cannot dispute that such is the general rule. This rule, however, is not a hard and fast one and there are well defined exceptions to it.

An Appellate Court has the power to notice and act upon any error appearing in the record and should do so if it affects the substantial rights of the parties.

In the instant case the insufficiency of the evidence to support the second count of the indictment is so clear that it would be a grave miscarriage of justice to allow this conviction to stand, especially when the penalty imposed thereon is ten years imprisonment which does not begin to run until the expiration of the ten year sentence imposed upon the first count. Under such circumstances the Courts have time and time again considered the question even though no motion for a directed verdict had been made in the trial Court.

In the case of *Edwards v. United States* (CCA-8), 7 Fed. (2d) 357, 359, the Court reviewed the sufficiency of the evidence, under circumstances identical with

those of the case at bar, and set forth the law in that regard supported by ample authorities as follows:

> *"There exists in this court, however, especially in cases where life and liberty are involved, an inherent power to consider the sufficiency of the evidence to sustain a verdict of guilty, even where the question is not properly presented to the trial court, if this court is satisfied there has been a miscarriage of justice.* If the evidence is convincing that defendants are guilty, then there is no reason ordinarily for the court to exercise such power. This court has in a number of instances, where life and liberty of an individual were at stake, considered the sufficiency of the evidence to warrant conviction of the crime charged, although the question was not properly raised in the trial court; Gillette v. United States, 236 F. 215, 149 C.C.A. 405, being a case in point.
>
> "In Sykes v. United States, 204 F. 909, 913-914, 123 C.C.A. 205, 209 (citing many cases), this court said: 'To escape from the effect of this conclusion, counsel challenge our attention to the fact that no request for a peremptory instruction to return a verdict for Sykes was made at the trial, and invoke the conceded rule that the court may not review the existence of evidence to sustain a verdict, in the absence of a request after the close of the evidence for a peremptory instruction. Rimmerman v. United States, 186 F. 307, 311, 108 C.C.A. 385. *But there is an exception to this general rule, which has been made to prevent just such gross injustice as would result from the punishment of the defendant Sykes upon the evidence which has been recited. It is that in criminal cases, where the life, or, as in this case, the liberty, of the defendant is at stake, the courts of the*

United States, in the exercise of a sound discretion, may notice such a grave error as his conviction without evidence to support it, although the question it presents was not properly raised in the trial court by request, objection, exception, or assignment of error.'

"In Robins v. United Startes (C.C.A.), 262 F. 126, 127, the court took the ground that, where the sufficiency of the evidence was not questioned in the trial court, it could not be urged here, 'unless in our discretion we decide so to do.' See also Humes v. United States, 182 F. 485, 105 C.C.A. 158; Savage v. United States, 213 F. 31, 130 C.C. A. 1; Feinberg v. United States (C.C.A.), 2 F. (2d) 955. In other jurisdictions, see Lockhart v. United States (C.C.A.), 264 F. 14; Quarles v. United States (C.C.A.), 274 F. 203; De Jianne v. United States (C.C.A.), 282 F. 737; Thompson v. United States (C.C.A.), 283 F. 895; Bilboa et al. v. United States (C.C.A.), 287 F. 125; Robilio et al. v. United States (C.C.A.), 291 F. 975; Horning v. District of Columbia, 254 U.S. 135, 41 S. Ct. 53, 65 L. Ed. 185." (Italics added.)

We respectfully submit that in the case at bar this Court should exercise its power and discretion and review the evidence to avoid a plain miscarriage of justice.

Dated, San Francisco,
July 23, 1945.

Respectfully submitted,
LEO R. FRIEDMAN,
SOL A. ABRAMS,
Attorneys for Appellant.

No. 10,939

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SALVATORE MAUGERI,	*Appellant,*
VS.	
UNITED STATES OF AMERICA,	*Appellee.*

APPELLANT'S PETITION FOR A REHEARING.

LEO R. FRIEDMAN,
Russ Building, San Francisco 4,
SOL A. ABRAMS,
Kohl Building, San Francisco 4,
Attorneys for Appellant and Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 10,939

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SALVATORE MAUGERI,	*Appellant,*
VS.	
UNITED STATES OF AMERICA,	*Appellee.*

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable Francis A. Garrecht, Presiding Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now Salvatore Maugeri, appellant above named, and respectfully petitions that the decision of this Court, rendered herein on the 20th day of October, 1945, be set aside and a rehearing of the cause be granted on each and all of the following grounds, to-wit:

(a) The opinion and decision of this Court should be amplified (for the reasons hereinafter stated) in order to disclose whether the judgment of the lower Court was affirmed on the merits, after a consideration of the points raised by appellant, or because of a

procedural defect in not having presented said matters to the lower Court and reserved an exception to an adverse ruling thereon;

(b) If the decision was on the merits, the opinion of this Court has misapplied the doctrines heretofore announced in the case of *Parmagini v. United States,* 42 Fed. (2d) 721, and *Gargano v. United States,* 140 Fed. (2d) 118.

THE DECISION SHOULD BE AMPLIFIED BY SETTING FORTH THE GROUNDS ON WHICH THE JUDGMENT WAS AFFIRMED.

The decision of this Court reads as follows:

"The judgment of the District Court is affirmed."

No grounds are given as the basis for the Court's decision.

One of the points raised on appeal was that the two offenses set forth in the indictment were disclosed by the evidence to be but one offense and that the lower Court, in ordering the sentences to run consecutively on the two counts of the indictment, inflicted double punishment on appellant for but one offense.

At oral argument Mr. Justice Mathews suggested that this matter should have been presented to the trial Court under the doctrines of the *Parmagini* and *Gargano* cases, supra.

Another point raised on appeal was that the evidence was insufficient to establish the charge set forth in the second count of the indictment. The Govern-

ment objected to a consideration of this point on the ground that no motion for a directed verdict had been made at the close of all the evidence in the case. Appellant countered with the proposition that this Court had the power to consider such point, even though it had not been properly presented to the trial Court nor the point preserved by a proper exception.

In the *Parmagini* and *Gargano* cases, supra, it is held that where double punishment for the same offense has been meted out by a trial Court, the trial Court, on motion, may correct this situation by modifying the judgment and sentence pronounced. These cases further hold that such motion may be made at any time, even though the term of Court has expired, and that the action of the trial Court constitutes a final judgment from which an appeal to this Court will lie.

If the decision of this Court, as to the double punishment, is based merely on a procedural matter, viz.: that an opportunity should first be given to the trial Court to correct the judgment and an appeal taken from any adverse action by the trial Court, then the opinion of this Court should so state. Otherwise, if such motion be made to the trial Court the decision of this Court would be construed as a decision on the merits and appellant would be foreclosed from receiving any relief if the facts justify relief.

On the other hand, if the decision of this Court on this point was on the merits then the decision should so state in order that, in certiorari proceedings to the

Supreme Court of the United States, no question would arise as to the issue involved and decided by this Court.

The same holds true for the second point raised by appellant on appeal, *i.e.,* the insufficiency of the evidence to establish the charge set forth in the second count. On certiorari proceedings to the Supreme Court, an examination of the record might well lead to the conclusion that this Court refused to consider such point on the merits and as such consideration, under the circumstances, would be a matter of discretion with this Court, its action, in refusing to exercise such discretion in favor of appellant, would not be subject to review by our highest tribunal.

It is respectfully suggested, therefore, that the decision of this Court be amplified merely by stating whether such decision was rendered on the merits of the two points raised by appellant, or whether the Court refused to consider either one or the other of said points due to a procedural defect.

THE COURT, IF THE DECISION WAS ON THE MERITS, MISCONSTRUED THE DOCTRINE ANNOUNCED IN THE CASES OF PARMAGINI AND GARGANO.

Assuming that this Court decided the case on its merits we further assume that it decided the question of double jeopardy on the authority of *Parmagini v. United States* and *Gargano v. United States,* supra.

We believe that the doctrines announced in such cases have been misapplied in the case at bar.

In the case of *Parmagini v. United States,* 42 Fed. (2d) 721, this Court recognized the doctrine that where a transaction was an entity only one offense was committed even though the acts, if divided by an appreciable period of time, could, under proper evidence, consist of two offenses.

In the case at bar the rule in the *Parmagini* case is peculiarly applicable. No appreciable period of time elapsed between the acts which might be construed as a facilitating of concealment of the opium by appellant and the acts which might be construed as facilitating the transportation of such opium. The test laid down in all the cases is whether the same evidence would be required to prove both offenses charged or whether additional facts are necessary to prove one of the offenses charged as distinguished from the other. This rule is not to be applied in its abstract aspect but must be applied by considering the facts of each individual case. Thus, it follows that if the evidence shows that the same testimony is necessary to establish each offense, then but one offense has been committed.

The record in this case discloses that the only evidence in the case is that relating to the occurrences from eleven o'clock on Saturday evening, August 12, until three thirty in the morning of August 13. Identically the same evidence was relied upon to support count two of the indictment as was relied upon to support count one. No facts could be eliminated from this testimony as to count one and still leave sufficient to establish the charge set forth in count two. The

converse is equally true. No facts could be eliminated from the testimony as to count two and still leave sufficient to establish the charge in count one. Under such circumstances the rule in the *Parmagini* case applies and we believe this Court erred in placing a different construction upon the language used in that decision.

In *Gargano v. United States,* 140 Fed. (2d) 118, the *sole question involved* was whether the indictment stated two separate and distinct offenses. We conceded that the indictment in the instant case set forth two separate and distinct offenses, our contention being that *the evidence disclosed but one offense.* The *Gargano* case is not controlling and we again believe that the Court erred in basing its conclusion on such decision, if in fact the Court did so.

For the foregoing reasons we respectfully submit that a rehearing be granted.

Dated, San Francisco,
November 19, 1945.

Respectfully submitted,
LEO R. FRIEDMAN,
SOL A. ABRAMS,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
November 19, 1945.

SOL A. ABRAMS,
Of Counsel for Appellant and Petitioner.

No. 10941

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of the Petition for Naturalization of FONG CHEW CHUNG,

FONG CHEW CHUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 55 Eleventh Street, San Francisco

No. 10941

United States
Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of the Petition for Naturalization of
FONG CHEW CHUNG,

FONG CHEW CHUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 55 Eleventh Street, San Francisco

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

MESSRS. GUS C. RINGOLE,

709 Central Tower,
703 Market Street,
San Francisco, California.

JOHN A. SINCLAIR,

Russ Building,
235 Montgomery Street,
San Francisco, California.

Attorneys for Petitioner and Appellant.

MESSRS. FRANK J. HENNESSY,

United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California.

EDGAR R. BONSALL,

Designated Examiner,
630 Sansome Street,
San Francisco, California.
Amicus Curiae.

Attorneys for Appellee.

U. S. Department of Justice
Immigration and Naturalization Service

No. 22 M. 9236

CERTIFICATE OF ARRIVAL

I Hereby Certify that the immigration records show that the alien named below arrived at the port, on the date, and in the manner shown, and was lawfully admitted to the United States of America ~~for permanent residence~~ as "Merchant's Son".

Name: Fong Chew Jung
Port of entry: San Francisco, California
Date: August 11, 1927
Manner of arrival: "President Lincoln"

I Further Certify that this certificate of arrival is issued under authority of, and in conformity with, the provisions of the Nationality Act of 1940 (54 Stat. 1137), solely for the use of the alien herein named and only for naturalization purposes.

In Witness Whereof, this Certificate of Arrival is issued March 2, 1944

For the District Director
LORENE M. CARTER
Lorene M. Carter
Chief, Mail, Files, Records and Information Section.

Certificate of Entry #59355.
Form N-215 [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

(Decision of Judge St. Sure—reported in 56 Fed. Sup. 17)

Original (To be retained by Clerk of Court)

United States of America

No. 7194-M

PETITION FOR NATURALIZATION

(Filed under Section 701 of the Nationality Act of 1940)

To the Honorable the District Court of the United States at San Francisco:

This petition for naturalization, hereby made and filed respectively shows:

(1) My full, true, and correct name is Fong Chew Chung

(2) I now reside at 1238 Stockton St., San Francisco, San Francisco, Calif.

(3) I was born on Jan. 1, 1908 in Hot Ping, Kwong Tung, China

(4) My personal description is: Age 36 years; sex M; color Yellow; complexion Olive; color of eyes Brown; color of hair Black; height 5 feet 4½ inches; weight 128 pounds; visible distinctive marks None; present nationality Chinese.

(5) I am not married. (6) I have no children.

(7) I emigrated to the United States, its Territories, or its possessions, from Hong Kong, China.

(8) My lawful admission to the United States, its Territories, or its possessions, was at San Francisco, Cal. under the name of Fong Chew Jung on

Aug. 11, 1927, on the Pres. Lincoln as shown by the certificate of my arrival attached to this petition.

(9) I entered the U. S. Army on Dec. 18, 1942, under Serial No. 39034977 and am at this time still in such service, serving honorably (or I was honorably discharged on .....).

(10) I am not, and have not been for the period of at least 10 years immediately preceding the date of this petition an anarchist; nor a believer in the unlawful damage, injury, or destruction of property, or sabotage; nor a disbeliever in or opposed to organized government; nor a member of or affiliated with any organization or body of persons teaching disbelief in or opposition to organized government. I am attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. It is my intention in good faith to become a citizen of the United States, and to reside permanently therein.

(11) Submitted herewith as a part of this, my petition for naturalization, are the affidavits of at least two verifying citizen witnesses required by law.

(12) Wherefore, I, your petitioner for naturalization, pray that I may be admitted a citizen of the United States of America.

(13) I, aforesaid petitioner, do swear (affirm) that I know the contents of this petition for naturalization subscribed by me, that the same are true to the best of my own knowledge, except as to matters therein stated to be alleged upon informa-

tion and belief, and that as to those matters I believe them to be true, and that this petition is signed by me with my full, true name: So help me God.

FONG CHEW CHUNG

AFFIDAVIT OF WITNESSES

The following witnesses, each being severally, duly, and respectively sworn, depose and say:

My name is Gus Ringole, Attorney, I reside at 709 Central Tower, SF, Cal.

My name is Leland Kim Lau, Ins. Broker, I reside at 1220 Powell St., SF, Cal.

I am a citizen of the United States of America; I personally know the petitioner named in this petition for naturalization to be a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, as shown by official service records.

I do swear (affirm) that the statement of facts I have made in this affidavit of this petition for naturalization subscribed by me is true to the best of my knowledge and belief: So Help Me God.

G. C. RINGOLE
LELAND G. KIMLAU

Subscribed and sworn to before me by the above-named petitioner and witnesses in the respective forms of oath shown in said petition and affidavit in the office of the Clerk of said Court at San Francisco, Cal. this 29th day of April Anno Domini 1944.

I hereby certify that Certificate of Arrival No.

22M 9236 from the Immigration and Naturalization Service showing the lawful entry of the petitioner above named has been by me filed with, attached to, and made a part of this petition on this date.

[Seal] C. W. CALBREATH
Clerk
T. L. BALDWIN
Deputy Clerk

I certify that the petitioner and witnesses named herein appeared before and were examined by me on April 29, 1944 prior to the filing of this petition.

[Seal] ZELMA C. BENTON
U. S. Naturalization
Examiner.

OATH OF RENUNCIATION AND ALLEGIANCE

[Followed by printed form not filled in.]

Petition denied May 22, 1944 order not eligible.

Form N-410. U. S. Department of Justice. Immigration and Naturalization Service. (Edition 4-10-42) [2]

(On the bottom and back of the Petition for Naturalization are the following:)

List 1653—4/29/44 & continued to May 1—1944 unable to speak English.

List 1656—cont to June 1—1944 May 12—44 filed Petnr's brief 5/17/44 filed U. S. Brief.

May 4—44 Gus Ringole appeared as atty ord. briefs filed Pet 10—10—5.

May 22 filed Opinion.

May 21—44 Filed Mot for reconsideration.

July 22 filed brief of John A. Sinclair Judge advocate Amer. Legion as Amicus Curiae and of authorities Petitioner.

Sept. 5—1944 Filed Opinion on denial of Petition for reconsideration and Order denying Petition for reconsideration.

Oct. 5—1944 filed Notice of Appeal.

[Endorsed]: Filed Apr. 29, 1944. [3]

In the Southern Division of the United States District Court for the Northern District of California

No. 7194-M

In the Matter of
The Petition for Citizenship of

FONG CHEW CHUNG

Before: Hon. A. F. St. Sure,
Judge.

REPORTER'S TRANSCRIPT

Monday, May 1, 1944,
2:00 O'Clock P. M.

The Clerk: Next is the matter of Fong Chew Chung.

Mr. Bonsall: This is in the matter of the Petition for Citizenship of Fong Chew Chung, entitled No. 7194-M, filed in this court on April 29, 1944.

The Clerk: I will swear the interpreter and the applicant.

(Whereupon Mr. Leland Kim Lau was sworn to interpret from the English language to the Chinese language and from the Chinese language to the English language.)

The oath was then administered to the applicant through the interpreter.)

Mr. Bonsall: May the record show that

FONG CHEW CHUNG

was sworn in this court on April 29, 1944

The Court: Yes. [4]

Mr. Bonsall: I will ask the applicant some questions.

(To the interpreter): You ask him these questions just as I give them.

The Interpreter: Yes.

Mr. Bonsall: Q. What is your name?

A. Fong Chew Chung.

Q. Where do you reside?

A. 1238 Stockton Street.

Q. Where were you born? A. China.

Q. Ask what town in China.

A. Canton, China.

Q. When did you enter the United States?

A. 1927.

Q. What month and day?

A. Seventh month, 23rd day.

Q. At what port did you enter the United States? A. San Francisco.

(Testimony of Fong Chew Chung.)

Q. On what vessel did you enter the United States? A. Lincoln.

Q. What documents did you have in your possession when you arrived in the United States in 1927? A. He was a son of a merchant.

Q. Did you have any certificate of identity?

A. He said he had a certificate.

Q. What happened to the certificate of identification? A. He lost it.

Q. Have you ever been outside the United States at any time since August 11, 1927? A. No.

Q. Have you ever been married? A. No.

Q. Have you any children? A. No.

Q. Have you ever been arrested or charged with crime at any time? A. No.

Q. Did you ever serve in the armed forces of the United States? A. Yes. [5]

Q. Do you have your discharge from such service? A. Yes.

Mr. Bonsall: The petitioner exhibits discharge in the name of Fong C. Chung, Serial No. 39034977, Private, Company "C", 84th Infantry, Tng. Bn., 17th Inf. Tng. Regt.

Are you the Fong C. Chung shown in this document? A. Yes.

(Testimony of Fong Chew Chung.)

Q. When did you enter the Military Service of the United States? A. December 26, 1942.

Q. Are you sure of that date in December?

A. Pretty sure.

Q. When was he discharged from such service?

A. August 5, 1943.

Q. August 5, 1943. Did he ever leave the United States? A. No, sir.

Q. On the back of the discharge appears the following notations: "Character: Very good." Then some initials. "Periods of active duty: None. Remarks: Hq. IRTC, Camp Roberts, California, July 19, 1943; not eligible for reenlistment or induction; no time lost under AW 107; soldier entitled to travel pay."

Do you know the reason that you were not recommended for reenlistment?

A. He don't even know that.

The Court: Q. Why were you discharged from the Army?

A. He says the Army claims that he does not know how to speak English.

Q. Well, what does he mean by that? That he did not understand the orders that were given to him? A. Yes, sir.

Q. Did you go to school? A. No, sir.

Q. Did anybody in the Army ask you if you would like to go to school? A. No, sir.

Q. I understand you have been in this country since 1927. A. Yes. [6]

(Testimony of Fong Chew Chung.)

Q. Have you been living in San Francisco all of the time? A. Yes, sir.

Q. What have you been doing since you have been here? A. Chinese grocery store.

Q. You mean to tell me you understand no English whatsoever? A. Not very much.

Q. Well, have you understood anything that I have said?

A. Did not understand it very much.

Q. How old are you?

(To the interpreter): Now, don't ask this of the applicant, Mr. Interpreter.

(To the applicant): How old are you?

A. (No response.)

Q. Are you now listening to me? How old are you? A. (No response.)

Q. Do you understand me?

A. (No response.)

Q. Savvy?

A. (Witness speaks in Chinese to interpreter.)

The Court: What does he say?

The Interpreter: He says, "What are you talking about?"

The Court: It seems strange to me that a man who has been in San Francisco since 1927 is not able to understand the English language, unless he is absolutely dumb.

(To the interpreter): You tell him that.

The Interpreter: He says he just didn't go to school.

The Court: What?

(Testimony of Fong Chew Chung.)

The Interpreter: He says he just didn't go to school.

The Court: Ask him if he went to school in China.

A. Yes, sir.

Q. Was this grocery store that you worked in in Chinatown, San Francisco? A. Yes, sir. **[7]**

Q. Have you any white patrons of that store?

A. Very little.

Q. Have you never attempted to learn the English language?

A. He didn't have time, he says.

Q. How old are you now?

A. Thirty-seven.

Q. Thirty-seven. You came here when you were twenty years old, is that right?

A. Yes, sir.

Q. You have been here 17 years, is that right?

A. Yes, sir.

Q. What wages did you receive while you were working in the store?

A. Sixty dollars a month.

Q. Did you get your board and lodging?

A. Yes, sir.

Q. Did you work for a relative?

A. There was partnership.

Q. Were you one of the partners?

A. Yes.

Q. How many partners were there?

A. Around 20 or 30.

Q. Partners? A. Yes.

Q. It was a cooperative store?

(Testimony of Fong Chew Chung.)

The Interpreter: What do you mean by that, Judge?

The Court: Everybody has a share; everybody takes an equal part of the profits.

A. There is some active and some inactive.

Q. Do I understand there were 20 or 30 who had shares in the store, and each one who shared took an equal share of the profits? A. Yes, sir.

Q. Your partners got $60.00 a month and you got $60.00 a month, is that right?

A. Yes; the ones that were working there.

Q. Did those who weren't working there get paid, too? A. No.

Q. And still they were partners?

The Interpreter: Sir?

The Court: And still they were partners? [8]

A. Yes, sir.

Q. What did they get out of it?

A. Well, in the event they made a profit, they shared in equal shares of the profit.

Q. That is, over the expense of running the business? A. Yes.

Q. Did you get any money above the cost of running the business? A. A little.

Q. How many active partners?

A. Twenty. That is, then, or now, at present?

Q. Yes; when he was active in it?

A. At that time?

Q. Yes. A. Prior to the war that is?

Q. Yes. A. Twenty.

(Testimony of Fong Chew Chung.)

Q. What kind of business did you do there? What did you sell?

A. General Chinese merchandise, your Honor.

Q. Did you sell vegetables? A. Yes.

Q. A grocery store? A. Yes.

Q. American groceries and Chinese groceries?

A. Mostly Chinese.

Q. What was your particular work?

A. Salesman, he says.

Q. Behind the counter, is that right? Selling goods behind the counter? A. Yes.

Q. Have you never had a desire to learn the English language?

A. I would like very much to learn English language, but I never got around—never had enough time to study, he says.

Q. What were you doing all of the time you were in the Army?

A. He was a cook, and general duty; that is, fatigue duty. You know, orderly.

Q. Who was your boss as cook?

A. American.

Q. And any Chinese besides yourself there?

A. Yes; he is the only Chinese.

Q. You mean to say you couldn't understand the orders that were [9] given you in the cookshop, or in the kitchen?

A. He answered, here is the point, what the cook want him to do, just like cutting up the vegetables and just direct him to do simple things in the kitchen.

(Testimony of Fong Chew Chung.)

Q. Do you know "potato" when you see it?

A. Yes.

Q. You say "potato" in English language.

A. Yes.

Q. Say it.

A. (In propria persona): Potato.

Q. What other American vegetables can you name in English? You know "cabbage"? "Cabbagey"? A. Yes.

Q. How do you say it?

A. (In propria persona): Cabbagey.

Q. "Cauliflower"? You must have learned those things in your store. You would not have to go to a cook camp in the Army to learn those things. Tell me, what do you think about this discharge of yours; why do you think you were discharged? Ask him that: Why do you think you were discharged from the Army?

A. He told me he didn't even know.

The Court: He could take an attitude in the Army like, "I don't understand," and "I don't want to understand," and, of course, he could act the fool and be discharged. Now, I want to find out if that is what he was doing.

Q. Do you understand what I mean?

The Interpreter: Yes, your Honor.

The Court: What is your name?

The Interpreter: Kim Lau.

The Court: Have you lived here some time?

The Interpreter: Yes, sir.

The Court: Do you know this applicant?

(Testimony of Fong Chew Chung.)

The Interpreter: I know him through the Legion post. I have seen him around. I don't particularly know him.

The Court: You don't know him very well? [10]

The Interpreter: Not real well, I should say, but he comes into the post. I see him around. I have seen him in the store.

The Court: You don't belong to the company that owns the store?

The Interpreter: Oh, no.

The Court: Were you born here?

The Interpreter: Yes, sir.

The Court: You have talked with this man a great deal, have you?

The Interpreter: No; I never did talk to him a great deal.

The Court: Have you asked him about the matter? Have you asked him why it was he was discharged?

The Interpreter: Yes. He told me since he thinks he don't know how to speak English, that is why he was discharged. And Section 8—I don't know what Section 8 is in the Army Regulations——

The Court: What is Section 8 of the Army Regulations, Mr. Bonsall?

Mr. Bonsall: I don't know offhand, your Honor.

The Clerk: I think it is "Unsuitable for Military Service," your Honor.

The Court: "Unsuitable for Military Service." You might look that up, Mr. Bonsall, if you can.

(Testimony of Fong Chew Chung.)

The Interpreter: Was the decision on Section 8? I think I noticed that when I looked at it.

The Court: Have you had enough conversation with him to satisfy yourself as to the reason why he was discharged?

The Interpreter: Frankly, no, your Honor.

The Court: The point is this: I am wondering if he is a stupid man. [11]

The Interpreter: I don't think he is stupid. There are very few Chinese boys—I mean, in the sense of being stupid. Of course, he might not know the English language. To be stupid in that sense, that is stupid in that he doesn't understand anything, your Honor, I don't think that is it.

The Court: Is he stupid mentally?

The Interpreter: Stupid mentally?

The Court: Do you think he may be stupid mentally from your conversation with him?

The Interpreter: Well, now, I think he might be that way. The way I talked to him on different occasions, he seemed to be in a fog at times; when I tried to get something from him, he is not alert in his thinking.

The Court: Is he evasive at all?

The Interpreter: No; he is not stupid, your Honor. It seems to me he does not make up his mind quick; he doesn't think. That is, if you ask him a direct question, he is not alert in answering.

The Court: I am unable to understand how it is possible for him to be in this country for 17 years

(Testimony of Fong Chew Chung.)

and not know some English, or know enough English to get by in the Army. You would think that is so, wouldn't you?

The Interpreter: Yes.

The Court: I think if I were in China that long I certainly would have picked up enough Chinese to be able to get by. But he doesn't seem to have been able to do that. He is an intelligent-looking young man.

The Interpreter: Yes, he is intelligent-looking.

The Court: Did you want to get out of the Army?

A. No, sir; he did not apply for discharge. They just told him—— [12]

Q. Were you drilled at all? A. Yes, sir.

Q. How long? A. Four weeks.

Q. Did you get along all right in the drilling?

A. No, sir.

Q. Could you do the Manual of Arms?

A. Not very well.

Q. Why are you applying for citizenship?

A. He says he reads in the Chinese paper that the Government, he was entitled to that right of citizenship, in the Chinese paper, and he made a request, and then he just looked at the Chinese paper. You know, the Chinese boys tell him if anybody is discharged from the Army who were aliens, they are entitled to citizenship, and he thought he was entitled to that right, and he applied.

Q. What makes you think you are entitled to

(Testimony of Fong Chew Chung.)

citizenship when you are unable to serve in the armed forces? Ask him that.

(The interpreter speaks in Chinese to the applicant.)

The Court: Did he understand your question? What does he say?

A. He says if he is not granted that citizenship, it is all right with him.

Q. All right with him. Yes, I know. But tell me——

The Interpreter: That is the direct question he told me. Maybe he is getting a little irritated by the direct questioning.

The Court: Well, he must not be irritated. I don't want to irritate him; I only want to find out —I would like to know why he thinks he is entitled to citizenship, if he is unable to serve in the armed forces. Ask him that.

A. He says the Government has a law, so he claims, that after being in the Service for three months, a man was eligible for citizenship.

The Interpreter: Now, this is not what he told me; this is what my own observation is: You know how Chinese boys are, you [13] know, getting citizenship after they get out of the Army. They feel like conquering themselves, that you are entitled to citizenship. They all get together, and they tell things, just like to me. They have an Honorable Discharge. This is not what he told me; this is my own observation.

(Testimony of Fong Chew Chung.)

The Court: Repeat just what I say to him.

Q. This law was made for the benefit of those who enlisted in the armed forces of the United States and who were able to serve. Now, it appears that you are unable to serve, because you do not possess the requisite qualifications. That being so, I wonder why it is you think you are entitled to citizenship.

Do you think you could give him that question?

(The interpreter speaks in Chinese to the applicant.)

The Interpreter: He didn't give me any direct answer.

The Court: What did he say?

The Interpreter: He says if he is given his citizenship, it is all right; if he is not, it is——

The Court: All right?

The Interpreter: All right.

The Court: Q. If you are given citizenship you would be expected to perform the duties of citizenship, and if you are unable to speak English, or read English, or understand it at all, how can you expect to perform the duties of an American citizen?

(The interpreter speaks in Chinese to the applicant.)

The Interpreter: He does not answer me, your Honor.

The Court: What does he say?

The Interpreter: He just says if he is not given it he would——

(Testimony of Fong Chew Chung.)

The Court: What? [14]

The Interpreter: He would just let it off at that.

The Court: Tell him that the law requires that he must be a citizen in fact, as well as in name, and if he knows nothing of the English language and thinks only in Chinese, how can he act as a citizen of the United States. Ask him if he has ever thought of that. I want to know what he thinks about that; what his idea is.

(The interpreter speaks in Chinese to the applicant.)

Mr. Bonsall: May this discharge be introduced in evidence, your Honor, and copied into the record?

The Court: Yes.

Mr. Bonsall: I will see it is returned.

The Court: Just one minute.

Tell him that we will keep his discharge here for the purpose of copying it into the record, and that will be returned to him.

The Interpreter: Yes. (Speaks in Chinese with applicant.)

The Court: He did not make any answer to that last question.

The Interpreter: No.

The Court: Does he belong to the same post——

The Interpreter: Well, he belongs to the American Legion post, the Chinese American Legion post.

The Court: Are there many Chinese here who are in the same situation as he is?

(Testimony of Fong Chew Chung.)

The Interpreter: I think there is.

The Court: I cannot understand that.

The Interpreter: I think, your Honor, in our Chinese American Legion post, I think we would have to start a class in Americanism and school some of these boys. I think I will bring it before the next meeting and have a program for these boys; [15] see if we can help them.

The Court: You see how important it is. In this case, here is this young man who was willing to go into the Service; who was inducted into the Service. They find him in there, and they find they are unable to use him. What good is he? He would be no good as a soldier; he wouldn't be any good at all. If he is no good as a soldier, what good would he be as a citizen? Certainly he could not perform the duties of a citizen.

Do you know something about citizenship?

The Interpreter: Yes.

The Court: A citizen is required to perform some duty. As a citizen, what could he do? What could he do? He could not vote. He could not do anything. It seems absurd to me to admit a man to citizenship who was unable to perform the duties of a citizen.

However, I feel that I ought to look into the matter and find out as much about the case as I can, and look into the law, before deciding it.

The Interpreter: Yes, your Honor.

Mr. Bonsall: I had this thought in mind: Possibly he would be willing to go to school and learn to

(Testimony of Fong Chew Chung.)

read, and something about our Government. We could allow it to stand over for six months.

Ask him how he would feel about that.

The Court: Ask him if he would be willing to go to school if a school were organized as a result of the activities of your organization. Ask him if he would be willing to go to a school and learn to speak the English language, and learn something about our form of government.

(The interpreter speaks in Chinese with the applicant.) [16]

A. Yes.

The Court: Now, we will keep that in mind.

Would you prepare a brief memorandum for me on the matter, Mr. Bonsall?

Mr. Bonsall: Yes. I might read into the record the section under which he is filing, your Honor.

This petition is filed under Section 701 of the Nationality Act of 1940 as amended, reading as follows (reading):

> "Sec. 701. Notwithstanding the provisions of Sections 303 and 326 of this Act, any person not a citizen, regardless of age, who has served, or hereafter serves honorably in the Military or Naval forces of the United States during the present war and who, having been lawfully admitted to the United States, including its Territories and possessions, shall have been, at the time of his enlistment or induction, a resident thereof, may be naturalized upon compliance with all the requirements of the naturalization

(Testimony of Fong Chew Chung.)

laws except that (1) no declaration of intention and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction, regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; and (4) no fee shall be charged or collected for making, filing, or docketing the petition for naturalization, or for the final hearing thereon, or for the certification of naturali- **[17]** zation"——

That is the pertinent section, your Honor.

The Court: It occurs to me that it might not help here so much if he did learn to speak English, because the case will have to be decided upon the facts and the law, as they existed at the time of his enlistment and his discharge, so it might not make any difference. That is to say, it might not help his case at all, even if he did get a sufficient knowledge of the English language to satisfy us that he knew something about our form of government. It might mean, however, that he would be entitled to re-enlistment.

I think we ought to, if we can, find out something from the Military authorities, as to the real reasons, not what they may consider legal reasons—good reasons; but what were the real reasons for the discharge of this man.

(Testimony of Fong Chew Chung.)

Mr. Bonsall: I think I should read into the record, along with the other section, this section, 704 (reading):

> "The provisions of this title shall not apply to (1) any person who during the present war is dishonorably discharged from the Military or Naval forces, or is discharged therefrom on account of his alienage, or (2) any concientious objector who performed no military duty whatever, or refused to wear the uniform: Provided, That citizenship granted pursuant to this title may be revoked as to any person subsequently dishonorably discharged from the Military or Naval forces in accordance with Section 338 of this Act; and such ground for revocation shall be in addition to any other provided by law."

I thought the two sections should be read together, your [18] Honor.

The Court: Yes.

I think I better continue this until some other day, to give me an opportunity to think about the matter, and also to give the Government an opportunity to furnish me any additional evidence they may secure.

Mr. Bonsall: How long did your Honor have in mind to continue the matter?

The Court: I don't know. I would like to have you communicate with the military authorities.

Mr. Bonsall: That can be done probably tomorrow, your Honor.

(Testimony of Fong Chew Chung.)

The Court: To see what can be learned about the real reason, or if there is anything back of this discharge which is not disclosed by the papers.

Mr. Bonsall: I don't know whether the Army would give us all that information.

The Court: Well, it is very strange if they wouldn't tell us about it. I would be surprised that they wouldn't tell us about it.

Mr. Bonsall: We have not asked them; I am just wondering.

The Court: Yes. It is an important matter.

Mr. Bonsall: I have here a report from The Adjutant General showing the exact reasons why he was discharged.

The Court: Read it.

Mr. Bonsall: (reading):

"Statement of the Military Service of Fong Chew Chung, Army Serial No. 39034977.

"The record shows that Fong Chew Chung, Army Serial No. 39034977, was inducted into the Military Service 18 December 1942. He was honorably discharged 5 August 1943, pursuant to the provisions of Section 8 A R, 615- [19] 364, by reason of his ineptitude for the Military Service. It was reported that he could neither read nor write the English language.

"Statement of service furnished 4 April 1944, by authorization of the Secretary of War.

"J. A. ULIO

"Major General

"The Adjutant General."

(Testimony of Fong Chew Chung.)

The Court: I don't know whether you read the enlistment record of the subject. Did you?

Mr. Bonsall: Yes, I did, your Honor.

The Court: Did you read what was on the reverse of it?

Mr. Bonsall: Yes, I did, your Honor.

The Court: All of it?

Mr. Bonsall: I thought I read everything that was pertinent. I may have overlooked something.

The Court: I was noticing here on the enlisted record the notations, "Military qualifications: Not qualified. Army specialty: None. Attendance at: None."

Mr. Bonsall: I felt that that probably could be copied into the record, that exhibit, your Honor.

The Court: Yes.

Mr. Bonsall: That was the reason I did not go into that.

The Court: Very well.

Mark it Exhibit 1 and have it copied into the record.

(The Honorable Discharge of Fong C. Chung was marked Exhibit No. 1, and in words and figures is as follows, to-wit:

(Testimony of Fong Chew Chung.)

"Army of the United States

(Army Insignia)

HONORABLE DISCHARGE [20]

This is to certify that

FONG C. CHUNG

39034977; Private, Co C, 84th Inf Tng Bn., 17th Inf Tng Regt. Army of the United States

is hereby Honorably Discharged from the military service of the United States of America.

This certificate is awarded as a testimonial of Honest and Faithful Service to his country.

Given at Camp Roberts, California.

Date: August 5, 1943.

(sgd) ORVIS D. MATHEWS

Orvis D. Mathews

Lt. Colonel, Infantry

17th Infantry Training

Regiment Executive Officer

W.D., A.G.O. Form No. 55 January 22, 1943.

(Reverse)

ENLISTED RECORD OF

(Last name) Chung (First name) Fong (Middle initial) C. (Army serial number) 39034977 (Grade) Private.

Born in Hoi Ping In the Country China.

Inducted[1] December 18, 1942, at San Francisco, California.

When enlisted or inducted he was 34 years of age and by occupation a Store Clerk.

(Testimony of Fong Chew Chung.)

He had Brown eyes, Black hair, Olive complexion, and was 5 feet 4½ inches in height.

Completed 0 years, 7 months, 18 days service for longevity pay. [21]

Prior service[2]: None.

Certification made for mustering out pay in the amount of $200.00.

Accounts of R. H. Bradshaw, Col., F. D.
Office of the Finance Officer
Camp Roberts, California
Aug. 5, 1943
Final Statement
Paid in Full 66.76

LOUIS WEISS,
Lt. Col., F. D.
(sgd) N. G. SMITH, Jr.
N. G. Smith, Jr.,
2nd Lt., F. D.

Noncommissioned officer: Never.

Military qualifications[3]: Not qualified.

Army specialty: None.

Attendance at (Name of non-commissioned officers' or special service school): None.

Battles, engagements, skirmishes, expeditions: None.

Decorations, service medals, citations: None.

Wounds received in service: None.

Date and result of smallpox vaccination[4]: December 27, 1942; Immune.

Date of completion of all typhoid-paratyphoid vaccinations[4]: January 15, 1943; Completed.

(Testimony of Fong Chew Chung.)

Date and result of diphtheria immunity test (Schick)[4]: Not taken.

Date of other vaccinations (specify vaccine used)[4]: Tetanus Toxoid completed February 15, 1943.

Physical condition when discharged: Good.

Married or single: Single.

Honorably discharged by reason of[5]: Section VIII, AR 615-360, [22] Par 9, SO #170, (see remarks)

Character: Very good SBR.

Periods of active duty[6]: None.

Remarks[7] Hq. IRTC, Camp Roberts, California, July 19, 1943. Not eligible for re-enlistment or induction. No time lost under AW 107; Soldier entitled to travel pay.

Label Button for Hon. Disch. Mil. Personnel Issued this the 16 day of Feb. 1944 by the undersigned at Hq. S.F. Rctg. & Ind. Dist., 444 Market St., San Francisco, Calif.

(sgd) S. B. RUSSELL
S. B. Russell
1st Lt., A.U.S.
Adjutant.

Signature of soldeir (prtd):
FONG C. CHUNG

Print of Right Thumb: (Thumb print)

(sgd) FRANCIS J. GROGAN
Francis J. Grogan
1st Lt., Infantry, Ass't Pers. Officer.

Apr. 29, 1944.

(sgd) E. R. BONSALL
Designated Examiner.

(Testimony of Fong Chew Chung.)

INSTRUCTIONS FOR ENLISTMENT RECORD

1. Enter date of induction only in case of trainee inducted under Selective Training and Service Act of 1940 (Bull. 25, W. D., 1940); in all other cases enter date of enlistment. Eliminate word not applicable.

2. For each enlistment give company, regiment, or arm or service with inclusive dates of service, grade, cause of discharge, number of days lost under AW 107 (if none, so state), and number of days retained and cause of retention in service for convenience of the Government, if any.

3. Enter qualifications in arms, horsemanship, etc. Show [23] the qualification, date thereof; and number, date, and source of order announcing same.

4. See paragraph 12, AR 40-210.

5. If discharged prior to expiration of service, give number, date and source of order or full description of authority therefor.

6. Enter periods of active duty of enlisted men of the Regular Army Reserve and the Enlisted Reserve Corps and dates of induction into Federal Service in the cases of members of the National Guard.

7. In all cases of men who are entitled to receive Certificates of Service under AR 345-500, enter here appointments and ratings held and all other items of special proficiency or merit other than those shown above.

(Testimony of Fong Chew Chung.)

INSTRUCTIONS FOR CERTIFICATE OF DISCHARGE

AR 345-470.

Insert name; as, 'John J. Doe,' in center of form.

Insert Army serial number, grade, company, regiment, or arm or service; as '1620302'; 'Corporal, Company A, 1st Infantry'; 'Sergeant, Quartermaster Corps.'

The name and grade of the officer signing the certificate will be typewritten or printed below the signature.

Mr. Bonsall: When it is copied, it may be returned to the applicant, your Honor.

The Court: Yes.

Now, I will continue this until what date, Mr. Clerk? I think I will continue it at least a month. June 1st?

The Clerk: May we say at two o'clock on June 5th? [24]

The Court: No, I do not think I want any further hearing on it. If we do, we will notify the applicant.

The Clerk: June 1st.

The Court (to the interpreter): You are appearing merely as his friend?

The Interpreter: Just as an interpreter, your Honor.

The Court: Do you belong to the same post?

The Interpreter: Yes, your Honor.

The Court: In view of the fact you think there

(Testimony of Fong Chew Chung.)

are a number of persons in the post who are in the same situation that this applicant is, I think perhaps you might make the suggestion you have mentioned.

The Interpreter: Yes, your Honor, I will; I will bring that before the next meeting.

The Court: I shall look into this matter very carefully before deciding it, and if we learn anything different, anything additional, I will notify the applicant. He can be here, then, on June 5th; otherwise I may be ready to decide it at that time.

Mr. Bonsall: All right, your Honor. We will have an investigation made of that in this case.

The Court: Yes.

[Endorsed]: Filed May 22, 1944. [25]

[Title of District Court and Cause.]

OPINION AND ORDER DENYING NATURALIZATION

Petitioner, a Chinese alien, makes application for citizenship under provisions of the Nationality Act of 1940 (8 USCA 1001) which read as follows:

"* * * Any person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and who, having been lawfully admitted to the United States * * * shall have been at the time of his enlistment or induction a resident thereof, may be naturalized upon compliance with all the requirements of the naturaliza-

tion laws except that (1) no declaration of intention and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; * * *."

This is a case of first impression, and is of considerable importance because its determination will affect a large number of future applications of a similar [26] nature.

In Schneiderman v. U.S., 320 U.S. 118, the Supreme Court said, "It is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized men." The court held that the "priceless benefits" of citizenship once conferred upon an alien by judicial decree "should not be taken away without the clearest sort of justification and proof." Nor should this great privilege be lightly conferred.

Notwithstanding the law dispenses with an educational test in naturalization where applicants have served honorably in the armed forces during the present war, I will mention that the evidence shows that although petitioner has resided in this country for seventeen years, and has been engaged in business in San Francisco as part owner in a Chinese

grocery, he does not speak or read English and knows nothing about our form of Government . It was necessary to take his testimony through an interpreter.

Petitioner was inducted into the Army of the United States in December, 1942, and was given an honorable discharge in August, 1943. The following notation appears on his discharge: "Section VIII A.R. 615-360, not eligible for re-enlistment or induction."

The pertinent provisions of Section VIII Army Regulations 615-360 read: [27]

"INAPTNESS OR UNDESIRABLE HABITS OR TRAITS OF CHARACTER

"51a. Procedure. * * * When an enlisted man——

"(1) Is inapt, or

"(2) Does not possess the required degree of adaptability for the military service after reasonable attempts have been made to reclassify and reassign such enlisted man in keeping with his abilities and qualifications, or

"(3) Gives evidence of habits or traits of character * * * which serve to render his retention in the service undesirable, and rehabilitation of such enlisted man is considered impossible after repeated attempts to accomplish same have failed, or

"(4) Is disqualified for service, physically or in character, through his own misconduct,

and cannot be rehabilitated so as to render useful service before the expiration of his term of service without detriment to the morale and efficiency of his organization, his company or detachment commander will report the facts to the commanding officer."

"55.

"a. Except as otherwise prescribed in b below, the discharge from the Army of the United States (blue) will be given.

"b. An honorable discharge from the Army of the United States will be given when, according to the approved findings of the board of officers required by paragraph 51c, the conduct of the enlisted man during his current period of service has been such as would render his retention in the service desirable were it not for his inaptitude or lack of required adaptability for military service. In such cases the discharge certificate will show that re-enlistment is not warranted."

It will be noted that in every case but one, where a discharge is given for causes specified in paragraph 51a, a blue or dishonorable discharge is given. The exception is made where no element of misconduct or moral turpitude appears.

The stated policy of the War Department in proceedings for discharge appears in paragraph 52a:

"No man will be separated from the service prior to the expiration of his term of service for any of the causes enumerated in paragraph

51a unless the Government can obtain no useful service from him by reason of his mental, moral, or physical disqualification once such man has been accepted for service as an enlisted man in the Army of the United States." [28]

Petitioner contends that the fact that he received an honorable discharge brings him within the provisions of Section 1001. Section 1001 does not use the words "has been honorably discharged" but the words "has served * * honorably." The question presented for decision is whether petitioner has "served honorably" within the contemplation of the statute.

"To serve" has been variously defined as "to render services so as to benefit, help, or promote; as, to serve one's country, mankind" (Webster's New International Dictionary); "to promote the interest of"; "contribute to the wellbeing of"; "aid by kind or useful offices"; "to be of use or service to"; "to employ oneself in the interest of another and in obedience to his directions." (Funk & Wagnall's New Standard Dictionary). These definitions are particularly applicable to service in the armed forces. It was because of his inability to be of use or service to the Government that petitioner was discharged.

The bestowal of citizenship under Section 1001 is based upon and made a reward for useful service. If the Government could "obtain no useful service" from petitioner, how can it be said that he has "served honorably", or at all? His inaptitude was not something which developed during the

period of enlistment. It had always existed, which fact the army, after repeated and reasonable attempts to make use of him, was forced to recognize. After induction it was found that petitioner was mentally disqualified to [29] understand and perform any duties required of him.

In my opinion petitioner has not served honorably, or at all. He has failed to meet the requirements of the statute.

It is therefore Ordered:

The petition for naturalization is denied.

Dated: May 22, 1944.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed May 22, 1944. [30]

[Title of District Court and Cause.]

PETITION FOR RECONSIDERATION

The above named alien hereby petitions the above Court for a reconsideration of the order heretofore entered herein denying his petition for naturalization. This application is based on the following grounds:—

First—When the briefs were filed herein there was no definite issue of law then presented to which they could be directed, and thus the precise point made and discussed in the opinion of the Court herein was not fully argued.

Second—The honorable discharge of petitioner states: "This certificate is awarded as a testimonial of Honest and Faithful Service to his country." His counsel did not call this statement to the at-

tention of the Court and consequently, the opinion is silent on its legal effect upon the question to which the opinion of the Court is directed.

Wherefore, petitioner prays that the order [31] heretofore made be set aside and the matter set down for further argument.

Respectfully submitted,
G. C. RINGOLE
Attorney for Applicant and Petitioner.

May 31, 1944.

(Acknowledgment of Service and Receipt of Copy.)

[Endorsed]: Filed May 31, 1944. [32]

[Title of District Court and Cause.]

Gus C. Ringole
Central Tower
San Francisco, California
Attorney for Petitioner

Edgar R. Bonsall
Designated Examiner
Post Office Building
San Francisco, California
Amicus Curiae

OPINION ON DENIAL OF PETITION FOR RECONSIDERATION

ST. SURE, District Judge:

A further hearing was had in the above matter

upon application for reconsideration. The petition is based on two grounds: first, that when the briefs were filed there was no definite issue of law then presented to which they could be directed; and second, that the point made in the court's opinion was not fully argued.

I think the only legal issue that could possibly be presented is whether petitioner "served honorably" within the meaning of Section 1001, 8 USCA. From the face of the [33] record and a consideration thereof it appears to this court that he did not.

The second ground calls the attention of the court to the statement on petitioner's honorable discharge: "This certificate is awarded as a testimonial of Honest and Faithful Service to his country." I considered the effect of these words in making the decision. I concluded that when construed with petitioner's record while an enlisted man and the Army Regulation governing his discharge, these words are ineffective and not binding on the court so far as concerns the present proceeding. The very reason for the discharge as set forth in petitioner's army record negatives the idea that petitioner has served in any way within the contemplation of the statute. I am mindful of the fact that the army has issued to applicant a paper designated as an honorable discharge. It speaks for itself so far as applicant's separation from the army is concerned, but its language does not per se entitle the bearer to citizenship. Only the law can do that, and quite clearly the law is against the applicant. As I have endeavored to show in my opinion, I think that both

the statute and the record show that applicant's petition for citizenship must be denied.

The principal argument of counsel for petitioner is that the court is bound by the action of the War Department in awarding an honorable discharge, and that such action is not subject to review, nor may it be set aside.

This court did not base its order on a claim of jurisdiction to usurp the power of the War Department, nor did it question the status of petitioner as the holder of an honorable discharge. If Section 1001 of Title 8 USCA [34] included in the designation of those entitled to citizenship the words "any person who has been honorably discharged" the court would have no alternative other than to admit petitioner.

It appears on the face of petitioner's discharge that it was awarded under the provisions of Section VIII of Army Regulations, 615-360. By examining the regulations referred to, the court was not questioning the action of the War Department but attempting to determine the circumstances under which the discharge was granted as shown by the reference on the discharge itself. It was found that an honorable discharge is granted under these regulations only when the Government can obtain no useful service from a soldier.

Although it may be unnecessary, but because of the importance of the case, I wish to say that I have no prejudice whatsoever against applicant because he is an alien Chinese; for upwards of half a century I have known and liked the Chinese as indi-

viduals and as a people. At the hearing I observed the petitioner on the witness stand. He appeared to me to be above the average in intelligence. He has been in the mercantile business in San Francisco for seventeen years.

I cannot escape the feeling that after his induction into the army petitioner found that he did not like it and resolved to get out, if possible. To accomplish such purpose, he shrouded himself in that imperturbable stolidity, easily recognized by Westerners who know Chinese, assumed an attitude of "Me no sabe," and there he stood as immovable [35] as a rock. If I am correct in my conclusion in this regard, then, the petitioner practiced a fraud upon the Government and under no circumstances would he be entitled to citizenship. If on the other hand, petitioner is just plain dumb, and the "Government can obtain no useful service from him because of his mental * * disqualification," he would not be entitled to the great gift of citizenship, as Congress never intended such an absurd consequence upon the adoption of the Nationality Act.

The petition will be denied.

August 30, 1944.

[Endorsed]: Filed Sep. 5, 1944. [36]

In the United States District Court for the Northern District of California, Southern Division

No. 7194-M

In Re

FONG CHEW CHUNG,
Petition for Naturalization

ORDER DENYING PETITION FOR RECONSIDERATION

Ordered:

The petition for reconsideration is denied.

Opinion filed.

A. F. ST. SURE
United States District Judge

[Endorsed]: Filed Sep. 5, 1944. [37]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the above named Fong Chew Chung hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order made and entered herein on May 22, 1944 denying said petitioner's petition for naturalization, and from the order made and entered herein on September 5, 1944 denying the petition for recon-

sideration of the order denying petitioner's petition for naturalization.

Dated: September 15, 1944.

G. C. RINGOLE
JOHN A. SINCLAIR
Counsellor for Petitioner and Appellant.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Oct. 7, 1944. [38]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of Said Court:

Sir:

Please prepare transcript of record on appeal in the above cause and to include:

1—Appellant's petition for naturalization on the appropriate form.

2—Transcript of testimony of May 1, 1944.

3—Opinion of court dated May 22, 1944.

4—Appellant's petition for reconsideration dated May 31, 1944.

5—Opinion of court denying petition for reconsideration dated August 30, 1944.

6—Notice of appeal.

G. C. RINGOLE
JOHN SINCLAIR
Attorneys for petitioner and appellant

[Endorsed]: Filed Nov. 30, 1944. [39]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 39 pages, numbered from 1 to 39, inclusive, contain a full, true, and correct transcript of the records and proceedings in the Matter of the Petition for Citizenship of Fong Chew Chung, No. 7194-M, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $5.90 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 8th day of December, A. D. 1944

[Seal] C. W. CALBREATH
Clerk
By E. VAN BUREN
Deputy Clerk [40]

[Endorsed]: No. 10941. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Petition for Naturalization of Fong Chew Chung. Fong Chew Chung, Appellant vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed December 11, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals In and For the Ninth Circuit

No. 10941

In Re

FONG CHEW CHUNG

Petition for Naturalization

STATEMENT OF POINTS RELIED ON UPON APPEAL

1. The Honorable District Court erred in denying petitioner and appellant's petition for naturalization.

2. The Honorable District Court erred in holding that a civil court has a right to review the administrative determination of appropriate military authority.

3. The Honorable District Court erred in holding that the court could go behind the discharge of a soldier duly issued by appropriate military authority to determine the character of service of a soldier.

4. The Honorable District Court erred in holding that an honorable discharge issued by appropriate military authority to a soldier is not conclusive of the character of service of a soldier.

Respectfully submitted,

G. C. RINGOLE

Attorney for Petitioner and Appellant.

Service of the within Statement of Points Relied On Upon Appeal and receipt of a copy thereof is admitted this 27 day of December, 1944.

FRANK J. HENNESSY

United States Attorney

[Endorsed]: Filed Dec. 27, 1944. Paul P. O'Brien, Clerk.

No. 10,941

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of the Petition for Naturalization of

FONG CHEW CHUNG.

FONG CHEW CHUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

OPENING BRIEF FOR APPELLANT.

GUS C. RINGOLE,
Central Tower, San Francisco 3, California,
Attorney for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 10,941

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of the Petition for Naturalization of

FONG CHEW CHUNG.

FONG CHEW CHUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

OPENING BRIEF FOR APPELLANT.

This is an appeal from an order of the District Court of the United States for the Northern District of California, Southern Division, denying his petition for naturalization.

JURISDICTIONAL STATEMENT.

(Rule 20, Section 2, Subdivision B, Rules of the United States Circuit Court of Appeals for the Ninth Circuit.)

The statutory provisions believed to sustain the jurisdiction are as follows:

(1) The jurisdiction of the District Court.

USCA, Title 8, Aliens and Nationality, Section 701(a), page 624:

"Exclusive jurisdiction to naturalize persons as citizens of the United States is hereby conferred upon the following specified courts: District Courts of the United States now existing * * * the jurisdiction of all the courts herein specified to naturalize persons shall extend only to such persons resident within the respective jurisdictions of such courts, except as otherwise specifically provided in this chapter."

There is no applicable exception.

(2) The jurisdiction of this Court upon appeal to review the judgment in question.

USCA, Title 28, Section 225(a), page 294:

"Appellate Jurisdiction—

(a) Review of final decisions. The circuit court of appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions—

"First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title."

Section 225(d), page 295:

"(d) Circuits in which reviews shall be had. The review under this section shall be in the following circuit courts of appeals: the decision of a district court of the United States within a State in the

circuit court of appeals for the circuit embracing such State; * * *"

Tuten v. United States, 270 U. S. 568, 70 L. Ed. 738.

(3) Pleadings necessary to show the existence of jurisdiction.

(a) The petition for naturalization (Transcript of Record, pp. 3-6).

(4) The facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction upon appeal to review the judgment in question.

On April 29, 1944, appellant filed in the Southern Division of the District Court of the United States for the Northern District of California his petition for naturalization (Tr. pp. 3-6, 7), alleging that he resided in San Francisco, California, was born in China, was lawfully admitted to the United States at San Francisco, California, entered the United States Army December 18, 1942. At a hearing in open Court statement of his military service was read in evidence showing that he was inducted December 18, 1942, honorably discharged August 5, 1943. (Tr. p. 26.)

In a written opinion dated May 22, 1944, the Court made the following order:

"Petition for naturalization is denied." (Tr. p. 38.)

Thereafter and on May 31, 1944, appellant filed his petition for reconsideration (Tr. pp. 38, 39). A further

hearing was had and the Court made the following order filed September 5, 1944:

"Petition will be denied." (Tr. pp. 39, 42.)

Notice of appeal was thereupon filed on October 7, 1944, in the District Court from the orders denying the petition for naturalization and the petition for reconsideration thereof, and praecipe for preparation of the transcript of record on appeal and statement of points on appeal were filed (Tr. pp. 44, 46).

ABSTRACT OF THE CASE.

As a wartime measure, Title X, "The Second War Powers Act", Act of March 27, 1942, 8 U.S.C., Section 1001, contains in pertinent part the following provision:

> "* * * Any person not a citizen, regardless of age, *who has served or hereafter serves honorably* in the military or naval forces of the United States during the present war and who, having been lawfully admitted to the United States, * * * may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; * * *" (italics supplied).

As indicated by its name, the Act was passed to meet the war emergency and provides for its own termination (Section 1001).

Thereafter appellant enrolled as a member of the Armed Forces on December 18, 1942, and was given an honorable discharge which for the purposes of this case contains two pertinent statements:

> First: "This certificate is awarded as a testimonial of honest and faithful service to his country." (Tr. p. 28.) This designates the character of his service.
>
> Second: "Honorably discharged by reason of: Section VIII AR 615-360 Paragraph 9 SO No. 170." This designates the reasons for his discharge.

The Army Regulation above referred to was issued under the authority of the Articles of War as follows:

> "THE ARTICLES OF WAR.
>
> "The articles included in this section (sec. 1, Ch. II, act of June 4, 1920, 41 Stat. 787) shall be known as the Articles of War and shall at all times and in all places govern the Armies of the United States * * *
>
> "ART. 108. Soldiers—Separation From the Service.—No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, signed by a field officer of the regiment or other organization to which the enlisted man belongs or by the commanding officer when no such field officer is present; and no enlisted man shall be discharged from said service before his term of

service has expired, except by the order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial." (Manual for Courts-Martial, U. S. Army 1928, pp. 203, 227.)

Section VIII, AR 615-360, November 26, 1942, in pertinent part provides:

"51a. Procedure * * * When an enlisted man—

(1) Is inapt, or

(2) Does not possess the required degree of adaptability for the military service after reasonable attempts have been made to reclassify and reassign such enlisted man in keeping with his abilities and qualifications, or

(3) Gives evidence of habits or traits of character * * * which serve to render his retention in the service undesirable, and rehabilitation of such enlisted man is considered impossible after repeated attempts to accomplish same have failed, or

(4) Is disqualified for service, physically or in character, through his own misconduct, and cannot be rehabilitated so as to render useful service before the expiration of his term of service without detriment to the morale and efficiency of his organization, his company or detachment commander will report the facts to the commanding officer."

"52a. No man will be separated from the service prior to the expiration of his term of service for any of the causes enumerated in paragraph

51a unless the Government can obtain no useful service from him by reason of his mental, moral, or physical disqualification once such man has been accepted for service as an enlisted man in the Army of the United States."

"54. Term to be used as cause of discharge.—a. In certificate of discharge.—The terms to be entered in the certificate of discharge as the reason for discharge will be merely 'Section VIII, AR 615-360; not eligible for reenlistment or induction'. b. In all papers other than certificate of discharge.—In stating the cause of discharge, a brief description of the actual cause thereof in the case in question will be given, followed by a parenthetical reference to these regulations, for example—

Inaptness (sec. VIII, AR 615-360).

Lack of adaptability for military service (sec. VIII, AR 615-360).

Habits (or traits of character) rendering retention in service undesirable (sec. VIII, AR 615-360).

(Physically) disqualified (in character) for service, through his own misconduct (sec. VIII, AR 615-360)."

"55. Form of discharge certificate to be given.—

a. Except as otherwise prescribed in b below, the discharge from the Army of the United States (blue) will be given.

b. An honorable discharge from the Army of the United States will be given when, according to the approved findings of the board of officers required

by paragraph 51c, the conduct of the enlisted man during his current period of service has been such as would render his retention in the service desirable were it not for his inaptitude or lack of required adaptability for military service. In such cases the discharge certificate will show that reenlistment is not warranted."

In view of the provisions of the foregoing paragraph 52a, the Court in its decision concluded:

"If the Government could 'obtain no useful service' from petitioner, how can it be said that he has 'served honorably', or at all? His inaptitude was not something which developed during the period of enlistment. It had always existed, which fact the Army, after repeated and reasonable attempts to make use of him, was forced to recognize. After induction it was found that petitioner was mentally disqualified to understand and perform any duties required of him.

"In my opinion petitioner has not served honorably, or at all. He has failed to meet the requirements of the statute." (Tr. pp. 37-38.)

The Court further said:

"A further hearing was had in the above matter upon application for reconsideration * * *

"I think the only legal issue that could possibly be presented is whether petitioner 'served honorably' within the meaning of Section 1001, 8 USCA. From the face of the record and a consideration thereof it appears to this court that he did not." (Tr. pp. 39, 40.)

Referring to the statement on appellant's honorable discharge, that it was awarded as a testimonial of honest and faithful service, the Court said:

> "I consider the effect of these words in making the decision. I concluded that when construed with petitioner's record while an enlisted man and the Army Regulation governing his discharge, these words are ineffective and not binding on the court so far as concerns the present proceeding. The very reason for the discharge as set forth in petitioner's army record negatives the idea that petitioner has served in any way within the contemplation of the statute." (Tr. p. 40.)

The question that arises therefore is whether an honorable discharge is or is not conclusive evidence indicating in the language of the statute that appellant has "served honorably in the military or naval forces of the United States during the present war". In other words, whether the finding of the Secretary of War on a matter of army administration is subject to review by civil courts.

SPECIFICATION OF THE ERRORS RELIED UPON.

1. That the Honorable District Court erred in denying appellant's petition for naturalization.

2. That the Honorable District Court erred in holding that a civil court has a right to review the administrative determination of appropriate military authority.

3. That the Honorable District Court erred in holding that it could go behind an honorable discharge duly issued to determine the character of a soldier's service.

4. That the Honorable District Court erred in holding that an honorable discharge duly issued by appropriate military authority is not conclusive of the character of a soldier's service.

ARGUMENT OF THE CASE.

SUMMARY OF THE ARGUMENT.

The wartime legislation (Title X, "The Second War Powers Act", Act of March 27, 1942, 8 U.S.C. 1001) waives a declaration of intention and the period of residence of an alien, permits the filing of a petition regardless of his residence and does not require a petitioner to speak the English language, sign the petition in his own handwriting or meet any educational test, provided, "he serves honorably in the military or naval forces of the United States and was lawfully admitted to the United States".

The Army Regulation under which appellant was discharged from the Army, Section VIII, AR 615-360, November 26, 1942, inhibits a statement as to the cause of discharge (paragraph 54). The same regulation (paragraph 55) permits two types of discharges, a blue discharge and an honorable discharge. A blue discharge is a discharge without honor. A board of officers is authorized to grant an honorable discharge. The board of officers awarded appellant an honorable

discharge under the authority of the regulation and used the language, "This certificate is awarded as a testimonial of honest and faithful service to his country." (Tr. p. 28.)

The statute involved makes lawful entry into the United States—not here material—and the character of the soldier's service the tests and only tests of right to citizenship. It is silent on the reason for the discharge, and the reason for the discharge therefore is wholly inconsequential.

Pursuant to regulations, a discharge is silent concerning the reason for its issuance (paragraphs 51a and 54). The Court therefore was without evidence upon which to predicate its findings in its several opinions as to that reason.

The Court stresses the provisions of paragraph 52a of the quoted regulations providing that no man will be separated from the service unless the Government can obtain no useful service from him. It is a matter of common knowledge and of frequent occurrence that a soldier, for reasons beyond his control or that lack wilfulness, may meet with circumstances that cause the character of his service to deteriorate and that reduce his capabilities by reason of qualities of character and apart from wilfulness, from efficiency to inefficiency, warranting his discharge under Section VIII. There is a field of infinite circumstances the impact of which upon the conduct of an excellent soldier will destroy his morale and warrant his discharge. Human conduct under varying conditions is unpredictable and

the regulation is intended to recognize that fact. There is no implication in such a discharge that the service of the soldier was never of value. Furthermore it is submitted that the board of officers authorized under paragraph 55 to issue a discharge without honor or an honorable discharge, had before it the full history of the soldier's service and authorized the honorable discharge in full knowledge of the provisions of paragraph 52a. The decision of the Honorable District Court trespasses upon an area of military administrative jurisdiction which if authorized, must necessarily lead to a lack of finality in matters of military cognizance and consequent confusion in military administration.

We appreciate and sympathize with the position of the learned District Court that citizenship should be denied to one who has performed no service for that high privilege. The obvious answers however, are first, there is no implication whatsoever in a discharge under Section VIII that the soldier has performed no service, second, that the authority for the determination of the character of a soldier's service is vested by regulations in a board of officers. Those regulations are the law of the land and thus binding upon the Courts as well as the Army, and the military determination is final and conclusive.

I.

JUDICIAL PROCESS DOES NOT EXTEND TO THE ADMINISTRATIVE ACTS OF AN OFFICER IN THE MILITARY SERVICE ACTING WITHIN THE SCOPE OF HIS JURISDICTION.

Pursuant to the cited regulations the Secretary of War through the board of officers found that appellant was entitled to an honorable discharge and accordingly, upon his separation from the service, issued and delivered that type of discharge to him though authorized to deliver a blue discharge, or discharge without honor. Their act in so doing is binding upon the Courts.

> *United States v. Eliason,* 16 Peters 291, 302, 10 L. Ed. 968:
>
> "The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation, and rules and orders publicly promulged through him must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority.
>
> "Such regulations can not be questioned or defied, because they might be thought unwise or mistaken."

Kurtz v. Moffitt, 115 U. S. 458, states:

> "Army regulations derive their force from the power of the President as Commander in Chief, and are binding upon all within the sphere of his legal and constitutional authority."

Reaves v. Ainsworth, 219 U. S. 304, 55 L. Ed. 225.

In this case under a federal statute the War Department retired an army officer. To review the proceedings of the board of officers discharging him, he sought certiorari. In upholding the dismissal of the proceeding the Court stated:

> "To those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers can not be reviewed or set aside by the courts."

At page 306:

> "The courts have no power to review. The courts are not the only instrumentalities of government. They can not command or regulate the Army. To be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the Army."

French v. Weeks, 259 U. S. 326, 335, 66 L. Ed. 965:

> "It is settled beyond controversy that, under such conditions, decision by military tribunals constituted by an act of Congress, can not be reviewed or set aside by civil courts in a mandamus proceeding or otherwise. (Citing cases.)
>
> "If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obli-

gation has been confided by the laws of the United States, from whose decision no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts. Dynes v. Hoover, 20 How. 65, 82, 15 L. Ed. 838, 844."

Tyler v. Pomeroy, 90 Mass. 480, at page 484:
"* * * with acts affecting military rank or *status* only or offenses against articles of war or military discipline, the civil courts have uniformly declined to interfere * * * (italics not supplied)."

Palmer v. United States, 72 C. Cls. 401:
"The regulations established by the Treasury Department pertain solely to administrative matters * * * it appears to be well settled not only by court decisions but by an unbroken practice in the military service which dates back to a time long preceding the organization of our government, that the courts will not interfere with or review the action of proper officers in the military service done in some administrative proceeding and not in conflict with statute."

An illuminative discussion of the right of a civil tribunal to review an army discharge is found in *Nordmann v. Woodring,* 28 Fed. Supp. 573. The Secretary of War ordered the discharge of a sergeant with more than fourteen years honorable service because he failed to declare his intention to become a citizen. The soldier brought an action to review this order. In dismissing the action the Court said (page 575):

"There are certain limitations placed upon powers of courts beyond which a court can not go, and these involve the discretionary powers of the Executive Department. In this particular case a great injustice may have been done the plaintiff, at the same time if the courts assume the power to review every official act of an officer of the Army involving the conduct of many thousands of enlisted men, a condition might result which would not only be embarrassing to the courts and to the Executive Department but would in effect destroy the organization and discipline of the Army. Congress has seen fit to lodge the power to discipline the Army and the power to discharge an enlisted man prior to the termination of his enlistment, in the President, the Secretary of War and the commanding officer, and it is not the function of the court to question the wisdom or the advisability of an Act of Congress so long as it is not in direct conflict with the provisions of the Constitution * * *"

"Under section 2, Article 2 of the Constitution, U.S.C.A., the President is made the Commander in Chief of the Army and Navy of the United States. Under this section, as Commander in Chief, the President has the power to employ the Army and Navy in a manner which he may deem most effectual. This includes the power to establish rules and regulations for the government of the Army and the Navy and such regulations made pursuant to the authority thus conferred upon the President, have the force of law."

It appears therefore to be universally recognized by the Courts that administrative determinations by

proper army authorities are binding in every forum of the land. Thus when the army has acted and found appellant worthy of an honorable discharge and further stated that his discharge is awarded as a testimonial of honest and faithful service, it used language as apt as it is conclusive to bring appellant within the predicate for citizenship established by "The Second War Powers Act", namely, as one "who has served or who hereafter serves honorably in the military or naval forces of the United States".

II.

AN HONORABLE DISCHARGE IS THE FINAL JUDGMENT OF THE WAR DEPARTMENT UPON THE ENTIRE SERVICE OF A SOLDIER.

The Judge Advocate General, statutory adviser to the Secretary of War, has held as follows:

> "A soldier, tried for desertion, was sentenced to dishonorable discharge. Prior to the approval and execution of the sentence, he received from the Government, without fraud on his part, an honorable discharge on account of defective mental development. Held, that such discharge was valid and terminated his enlistment; that the Government is thereby estopped to discharge him in any other manner; and that he is entitled to pay from the date of the discharge." (220.8, July 11, 1918. Digest of Opinions JAG 1912-1940, page 380.)
>
> "An honorable discharge is in effect the judgment of the Government upon the entire military record

> of the soldier during the period of enlistment. A soldier receiving a discharge with notation 'service honest and faithful' may be regarded as being in a state of honor *at all times during the enlistment terminated by such discharge,* even while serving a sentence to confinement at hard labor and forfeiture imposed by summary court-martial." (220.803, Feb. 7, 1923. Digest of Opinions JAG, 1912-1940, page 381.) (Italics supplied.)
>
> "Two enlisted men were discharged to enable them to accept commissions. They were then appointed second lieutenants, without knowledge that they were below the statutory age. Held, that such discharge from military service, unless it was obtained by fraud, is final and can not be amended or revoked." (210.1, Jan. 24, 1918. Digest of Opinions JAG, 1912-1940, page 383.)

The determination of the Judge Advocate General that a discharge constitutes a final judgment of the War Department upon the military service of the soldier involved has been affirmed by the Courts.

United States v. Kelly, 82 U.S. 34, 21 L.Ed. 106.

In this case the United States appealed from a judgment of the Court of Claims in favor of a Civil War veteran for bounty money. The soldier deserted and was restored to duty without trial on condition that he make good time lost. Complying with this condition he was honorably discharged. The Government contended that his desertion forfeited his right to the bounty. In affirming the judgment the Court said:

> "We do not think that, under the circumstances, the bounty was forfeited. The able lawyer who fills at present the post of Judge Advocate General, in a case similar to the present, held that 'the honorable discharge of the deserter was a formal final judgment passed by the Government upon the entire military record of the soldier, and an authoritative declaration by it that he had left the service in a status of honor; * * * With this opinion we entirely concur."

In *Zearing v. Johnson,* 10 Cal. App. (2d) 654 at page 657, in a matter involving a veteran's tax exemption, the Court said in a practical paraphrase of the quoted language of the Judge Advocate General:

> "An honorable discharge is a formal and final judgment based by the government upon the military record of a member of its armed forces, and a declaration that such person had left the service in a status of honor."

CONCLUSION.

To summarize the foregoing argument we respectfully submit:

First: There is no evidence in the record as to the exact reason for the discharge of appellant from the army and therefore the finding of the District Court as to such reason is without a record predicate. The record is necessarily silent upon this subject because the Army Regulation (paragraph 54) prohibits the

statement upon the Certificate of Discharge of the actual cause for the discharge.

Second: The only conditions imposed by "The Second War Powers Act" upon the right of appellant to citizenship are two: first, that he be lawfully in the United States. That is admitted (Tr. p. 2). Second, that he shall have served honorably in the military service of the United States during the present war. He was given an honorable discharge which is conclusive proof of honorable service even without the additional statement thereon, "This certificate is awarded as a testimonial of honest and faithful service to his country."

This determination by military authority is binding upon the War Department, binding upon the Courts, and under the view of the Judge Advocate General supported by the cases quoted can not even be modified or revoked, except for mistake or fraud, by the War Department itself, much less by the Courts.

The Act confers the privilege of citizenship upon all soldiers who honorably serve, irrespective of how discharged. The Act is silent upon the cause for or method of discharge.

The judgment of the Secretary of War upon the entire service of the soldier is a conclusive judgment which can not be reviewed, modified or revoked by a civil court.

Accordingly it is respectfully submitted that the order of the Honorable District Court be reversed and

the cause remanded with a direction that, if otherwise appropriate, appellant's petition for naturalization be granted.

Dated, San Francisco, California,
February 8, 1945.

Respectfully submitted,
GUS C. RINGOLE,
Attorney for Appellant.

No. 10,941

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of the Petition for Naturalization of

FONG CHEW CHUNG.

FONG CHEW CHUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,
JAMES T. DAVIS,
Assistant United States Attorney,
R. B. MCMILLAN,
Assistant United States Attorney,
Post Office Building, San Francisco 1,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes and Texts

No. 10,941

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of the Petition for Naturalization of

FONG CHEW CHUNG.

FONG CHEW CHUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the District Court of the United States for the Northern District of California, Southern Division, denying appellant's petition for naturalization. (Tr. 33-38.) The Court below had jurisdiction under the provisions of 8 U.S.C. 701 (a). The jurisdiction of this Honorable Court is invoked under the provisions of 28 U.S.C. Section 225 (a).

STATEMENT OF THE CASE.

On April 29, 1944 appellant filed in the District Court of the United States for the Northern District of California, Southern Division, his petition for naturalization. (Tr. 3-6.) A hearing was held in the Court below on May 1, 1944. (Tr. 7-33.) On May 22, 1944 the Court below made its order denying appellant's petition for naturalization. (Tr. 33-38.) On May 31, 1944 appellant filed a petition for reconsideration. (Tr. 38-39.) On September 5, 1944 the Court below made its order denying appellant's petition for reconsideration of the previous order. (Tr. 39-43.)

STATEMENT OF FACTS.

The petitioner is a native and citizen of China, lawfully admitted to the United States in 1927. On December 18, 1942 he was inducted into the military services and was honorably discharged from the United States Army on August 5, 1943. The following notation appeared on the discharge: "Section VIII A.R. 615-360. Ineligible for reenlistment or induction". The Court below found that the petitioner, although a resident in this country for seventeen years, and engaged in business in San Francisco as part owner in a Chinese grocery, does not speak or read English and knows nothing about our form of government. His testimony was taken through an interpreter. (Tr. 34-35.) The Court further stated, in its opinion on denial of petition for reconsidera-

tion, that, in its opinion, the appellant either practiced a fraud upon the Government by assuming an attitude of "Me no sabe" in order to get out of the Army, or was just "plain dumb". That in either case he would not be entitled to citizenship. (Tr. 42.)

THE QUESTION.

The sole question presented by this appeal is whether a petitioner for naturalization otherwise qualified, who has been honorably discharged from the military or naval forces has "served * * * honorably" within the meaning of Section 1001, Title 8 U.S.C. (Title XI, Second War Powers Act of 1942).

STATEMENT OF THE LAW.

The statute under which the appellant filed his petition for naturalization reads in part as follows:

> "§1001. *Exception from certain requirements.*
>
> Notwithstanding the provisions of sections 703 and 726 of this title, any person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and who, having been lawfully admitted to the United States, including its Territories and possessions, shall have been at the time of his enlistment or induction a resident thereof, may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention and no period of residence within

the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting or meet any educational test; * * *."

(Title 8 U.S.C. Section 1001.)

The pertinent provisions of Section VIII Army Regulations 615-360 read (27):

"INAPTNESS OR UNDESIRABLE HABITS OR TRAITS OF CHARACTER

"51a. Procedure. * * * When an enlisted man—

(1) Is inapt, or

(2) Does not possess the required degree of adaptability for the military service after reasonable attempts have been made to reclassify and reassign such enlisted man in keeping with his abilities and qualifications, or

(3) Gives evidence of habits or traits of character * * * which serve to render his retention in the service undesirable, and rehabilitation of such enlisted man is considered impossible after repeated attempts to accomplish same have failed, or

(4) Is disqualified for service, physically or in character, through his own misconduct, and cannot be rehabilitated so as to render useful service before the expiration of his term of service without detriment to the morale and efficiency of his organization, his company or detachment com-

mander will report the facts to the commanding officer."

"55.

a. Except as otherwise prescribed in b below, the discharge from the Army of the United States (blue) will be given.

b. An honorable discharge from the Army of the United States will be given when, according to the approved findings of the board of officers required by paragraph 51c, the conduct of the enlisted man during his current period of service has been such as would render his retention in the service desirable were it not for his inaptitude or lack of required adaptability for military service. In such cases the discharge certificate will show that re-enlistment is not warranted."

The stated policy of the War Department in proceedings for discharge appears in paragraph 52a:

"No man will be separated from the service prior to the expiration of his term of service for any of the causes enumerated in paragraph 51a unless the Government can obtain no useful service from him by reason of his mental, moral, or physical disqualification once such man has been accepted for service as an enlisted man in the Army of the United States." (28)

DISCUSSION.

As this is a case of first impression involving the interpretation of a statute and because questions of governmental policy are involved, we referred the

matter to the Attorney General. We are in receipt of opinions from the office of the Judge Advocate General of the Army, the Immigration and Naturalization Service, the Attorney General and the Solicitor General with the request that we make the views of these departments known to this Honorable Court.

The Judge Advocate General adopts the position that the War Department has the sole authority to determine administratively the character of the service rendered by a member of the Army and that its findings are final and conclusive and not subject to review by the Courts. (Citing *United States v. Kelly,* 15 Wall. 34, 36, 21 L. Ed. 106, in which the Supreme Court quoted with approval an opinion of the Judge Advocate General holding that an honorable discharge is "a formal, final judgment passed by the Government upon the entire military record of the soldier, and an authoritative declaration by it that he had left the service in a status of honor * * *" and *Nordman v. Woodring,* 28 F. Supp. 573 (W.D. Okla., 1939); *Davis v. Woodring,* 111 F. (2d) 523 (App. D.C., 1940).

We wish to state that the lower Court clearly recognized this principle of law and did not question its validity. The Court was careful to point out that it did not claim the jurisdiction to usurp the power of the War Department nor did it question the status of petitioner as the holder of an honorable discharge but, granting this, that the possession of an honorable discharge is not a final and conclusive finding that the

person possessing it has "served honorably" within the contemplation of the statute. (8 U.S.C. 1001.)

The Court said:

> "The second ground calls the attention of the court to the statement on petitioner's honorable discharge: 'This certificate is awarded as a testimonial of Honest and Faithful Service to his country.' I considered the effect of these words in making the decision. I concluded that when construed with petitioner's record while an enlisted man and the Army Regulation governing his discharge, these words were ineffective and not binding on the court so far as concerns the present proceeding. The very reason for the discharge as set forth in petitioner's army record negatives the idea that petitioner has served in any way within the contemplation of the statute. I am mindful of the fact that the army has issued to applicant a paper designated as an honorable discharge. It speaks for itself so far as applicant's separation from the army is concerned, but its language does not per se entitle the bearer to citizenship. Only the law can do that, and quite clearly the law is against the applicant. * * *
>
> It appears on the face of petitioner's discharge that it was awarded under the provisions of Section VIII of Army Regulations 615-360. By examining the regulations referred to, the court was not questioning the action of the War Department but attempting to determine the circumstances under which the discharge was granted as shown by the reference on the discharge itself. It was found that an honorable

> discharge is granted under these regulations only when the Government can obtain no useful service from a soldier."

The Immigration and Naturalization Service, calling attention to the legislative history of Bill S. 2208,* which became the statute in question (8 U.S.C. 1001), believes, in brief, that the statute should be liberally construed in favor of the alien and that possession of an honorable discharge should be construed as conclusive evidence that the applicant has "served honorably".

The legislative history of the statute indicates that it is a "similar bill" to the one had during World War I and is "almost identically based on legislation we had in the last war" and "carries forward the policy" of that bill. But the present legislation surpasses the antecedent law in liberality and generosity. The Service indicates that the changes made by the present law with respect to aliens serving in the army are revolutionary. For example, for the first time in the history of the naturalization laws provision is made for the extra-judicial bestowal of naturalization through the medium of executive or administrative officers in the case of aliens who are not within the jurisdiction of any naturalization Court; educational qualifications are dispensed with

---

*Senate Report 989 (2d Sess. 77th Cong.). Hearings before the Committee on the Judiciary, House of Representatives, 77th Cong. (2d Sess. Serial No. 10).

and otherwise racially ineligible aliens are made eligible.

Similar legislation during World War I (Act of July 19, 1919 (41 Stat. 222) used the phrase "honorably discharged" rather than "served honorably" and it is the opinion of the service that the present Congress intended to liberalize rather than restrict the method of naturalization of members of the armed forces.

The Attorney General adopts the views of the Judge Advocate General and of the Immigration and Naturalization Service and further points out, in discussing the similarity between the present legislation and that of World War I, that the previous legislation (Act of July 19, 1919 (41 Stat. 222)) was retrospective and, hence, used the phrase "honorable discharge" whereas the present law is designed to favor the naturalization of aliens who had served, were serving or thereafter served honorably in the military forces and that, hence, an honorable discharge could not have been made the basis for qualification.

He also advances a plausible explanation for the use of the phrase "served honorably" in the statute rather than "honorable discharge", even in the case of those who had completed their service, because of the variation in the types of discharges in use by the several branches of the military and naval forces. The Navy, for example, provides for a discharge "under honorable conditions", as opposed to an "honorable discharge" even for disability incurred in line of

duty, where the veteran's record of marks as to proficiency or conduct are below a certain arbitrary standard. Manifestly, in the case of a veteran so discharged, he should be entitled to the benefits of the naturalization statute even though his discharge was "under honorable conditions", rather than an "honorable discharge". However, as pointed out by the Solicitor General there is no evidence supporting this position in the legislative material.

Finally, the Attorney General states that from a practical standpoint, if the Courts were allowed to follow the principle laid down in this, the first case interpreting the statute, and to go behind certificates of honorable discharge issued by the Army and Navy so as to find, independently, what was the character of service rendered by the petitioner, it can be foreseen that there may be as many interpretations as there are Courts; and that the fair and impartial administration of the law would be hampered appears to be obvious.

The Solicitor General has reviewed the recommendations of the other Departments to the effect that a certificate of honorable discharge should be conclusive as to the honorable character of the holder's services in the armed forces. The arguments in support of their position may be summarized as follows:

(1) The legislative history, particularly statements of the Attorney General during the hearings before the House Judiciary Committee, that the provision was based upon World War I legislation under

which the test was honorable discharge, not honorable service; (2) considerations of policy, particularly the policy of leaving to the War and Navy Departments the final appraisal as to whether the veteran's service has been honorable or not; and (3) the administrative difficulties which would be involved in making judicial inquiry in every case into the character of the service rendered by honorably discharged veterans.

The Solicitor General states that the interpretation urged by the various Departments is more reasonable and more desirable as a matter of Government policy but feels nevertheless that the statute is ambiguous and that there is room for judicial construction. He recommends that the Government file a memorandum setting forth fully and fairly all of the considerations relevant in construing the statute and urging that the Circuit Court of Appeals adopt the construction that a certificate of honorable discharge is conclusive as to the honorable character of the alien's military service.

CONCLUSION.

While we agree with the lower Court that the great gift of citizenship should not be lightly bestowed and that, in some instances, of which the instant case is a good example, undeserving persons will be admitted to citizenship because they hold an honorable discharge from the military service which may have been granted them for reasons other than those usually considered as being tests of good citizenship, we feel constrained,

because of the apparent legislative intent as well as for reasons of governmental policy, to urge this Honorable Court to adopt the construction that a certificate of honorable discharge is conclusive as to the honorable character of the alien's military service.

Dated, San Francisco,
March 5, 1945.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,
JAMES T. DAVIS,
Assistant United States Attorney,
R. B. MCMILLAN,
Assistant United States Attorney,
Attorneys for Appellee.

No. 10943

United States

Circuit Court of Appeals

For the Ninth Circuit.

SAN MATEO FEED & FUEL COMPANY, a Corporation, and H. E. CASEY COMPANY, a co-partnership,

Appellants,

vs.

G. S. HAYWARD, as Trustee in the Matter of Joseph Louis Scardino, Bankrupt,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 55 Eleventh Street, San Francisco

No. 10943

United States
Circuit Court of Appeals
For the Ninth Circuit.

SAN MATEO FEED & FUEL COMPANY, a Corporation, and H. E. CASEY COMPANY, a co-partnership,

Appellants,

vs.

G. S. HAYWARD, as Trustee in the Matter of Joseph Louis Scardino, Bankrupt,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 55 Eleventh Street, San Francisco

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index **Page**

Index **Page**

Index **Page**

Index **Page**

NAMES AND ADRESSES OF ATTORNEYS

F. E. HOFFMAN,

231 Second Ave.,
San Mateo, Cal.

ARTHUR P. SHAPRO,

420 Russ Bldg.,
San Francisco

HUGH F. MULLIN, Jr.

220 Third Ave.,
San Mateo, Cal.

ERNEST J. TORREGANO,

988 Mills Bldg.,
San Francisco

Attorneys for Appellants

MAX H. MARGOLIS

1650 Russ Bldg.,
San Francisco

Attorney for Appellee

District Court of the United States
For the Northern District of California
Southern Division

No. 34909 S in Bankruptcy

In the Matter of

JOSEPH LOUIS SCARDINO
Bankrupt

ORDER OF ADJUDICATION AND REFERENCE, ETC.

At San Francisco, in said District, on the 30th day of April, 1942.

The Petition of Joseph Louis Scardino filed on the 29th day of April, 1942, that he be adjudged a bankrupt under the Act of Congress relating to Bankruptcy, having been heard and duly considered; and no opposition being made thereto

It Is Adjudged that the said Joseph Louis Scardino is a bankrupt under the Act of Congress relating to Bankruptcy.

It Is Ordered that the above-entitled proceeding be, and it hereby is referred to Burton J. Wyman, one of the Referees in Bankruptcy of this Court, to take such further proceedings therein as are required and permitted by said Act, and that the said Joseph Louis Scardino shall henceforth attend before the said Referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

It Is Further Ordered that all notices required to be published in the above-entitled matter, and all

orders which the Court may direct to be published, be inserted in Burlingame "Advance-Star" a newspaper published in the County of San Mateo, State of California, within the territorial district of this Court, and in the County within which said bankrupt resides.

Dated April 30, 1942.

A. F. St. SURE
District Judge

[Endorsed]: Filed Apr. 30, 1942. [1*]

In the Southern Division of the United States District Court for the Northern District of California

No. 34909-S In Bankruptcy

In the Matter of

JOSEPH LOUIS SCARDINO

Bankrupt

CERTIFICATE AND REPORT OF REFEREE ON PETITION FOR REVIEW OF REFEREE'S ORDER OF SEPTEMBER 15, 1943

To Honorable A. F. St. Sure, United States District Judge for the Northern District of California:

I, Burton J. Wyman, one of the referees in bank-

*Page numbering appearing at foot of page of original certified Transcript of Record.

ruptcy of this court, and the referee in charge of this proceeding respectfully certify and report that:

This matter comes before the court on the following verified petition for review filed in the above entitled proceed- [2] ing by Max H. Margolis, Esq., on behalf of G. S. Hayward, the trustee of the estate of the above-named bankrupt:

"Now comes your petitioner G. S. Hayward and respectfully represents:

"That the above named Bankrupt filed his voluntary petition in Bankruptcy on April 29, 1942, and was duly adjudicated a Bankrupt by the above entitled court on April 30, 1942. That thereafter and on May 21, 1942, your petitioner was duly appointed Trustee of the estate and effects of said Bankrupt, and ever since said date she has been and now is the duly appointed, qualified and acting Trustee of the estate and effects of said Bankrupt.

"That on April 2, 1943, petitioner filed her duly verified petition for an Order to Show Cause to issue requiring the therein named Respondents H. E. Casey Company and San Mateo Feed & Fuel Co., to appear and show cause before said Referee in Bankruptcy, why an order should not be made directing said Respondents to turn over, to petitioner as such Trustee, certain money paid to them and each of them by the Bankrupt within four months of the filing of his petition in Bankruptcy, on the ground that said payments constituted voidable preferences. That said Respondents respectively filed their duly verified answers to Trustee's said petition and appeared pursuant to said Order to Show Cause before said Referee in Bankruptcy.

"That a hearing thereon was had on April 12, 1943, before said Referee in Bankruptcy and the matter was thereafter submitted on briefs filed in these proceedings. That said Referee in Bankruptcy on September 15, [3] 1943, made his Order denying the prayer in said petition, in the manner following:

"(Title of court and cause)

" 'ORDER ON PETITION OF TRUSTEE AND ORDER TO SHOW CAUSE BASED THEREON

" 'This matter comes before the court on the petition of G. S. Hayward, the trustee of the estate of the above-named bankrupt, represented by Max H. Margolis, Esq., the order to show cause based upon said petition, the answer of San Mateo Feed & Fuel Co., a corporation, represented by F. E. Hoffmann, Esq., the answer of H. E. Casey Company, represented by Hugh F. Mullin, Jr., Esq., and the evidence taken upon said petition, order to show cause and said answers. The matter having been submitted on briefs, and the briefs having been filed and considered by the court in connection with the allegations of the petition, the answers thereto, and the evidence offered and received in connection therewith, and the court being fully advised in the premises, finds that no proof has been offered and/or received showing that, at the time either of the assignments referred to in said petition was made by said bankrupt, the aggregate of the property of said bankrupt, exclusive of any alleged property which said bankrupt may have conveyed, trans-

ferred, concealed, removed or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, if such said bankrupt did, then was not, at a fair valuation, sufficient to pay his debts.

" 'Upon the record presented herein, the court concludes as a matter of law that such trustee, upon the petition and order to show cause now before the court, [4] is not entitled to a turn-over of any part of the money referred to in either of the assignments referred to in said petition.

" 'It, Therefore, Hereby Is Ordered, Adjudged And Decreed that the trustee's said petition be, and it is, Dismissed, and that the order to show cause based thereon, be, and it is, Discharged, without prejudice, in each instance, to said trustee's, within ten (10) days from date hereof, taking such further steps as said trustee may be advised in connection with each of said assignments, by virtue of the provisions of Section 70(e) of the Bankruptcy Act.

Dated: September 15, 1943

BURTON J. WYMAN

Referee in Bankruptcy'

"That said order is erroneous and petitioner is aggrieved thereby in the following particulars:

"That to permit said order to stand would unjustly deprive Bankrupt's remaining creditors of their fair and equitable share in the assets of his estate, and unjustly enrich Respondents.

"That there is sufficient testimony in the record to support a finding of the Bankrupt's insolvency.

The record is replete with uncontradicted testimony showing facts and circumstances from which the court could and should have drawn the inference of the Bankrupt's insolvency at the times the several preferences were made to the Respondents. The manner in which the preferences were obtained, the activities of Respondents and their respective agents, and the information they and each of [5] them were in a position to ascertain and in fact did ascertain, all tend to support the Bankrupt's insolvency.

"To supplement and further support the fact of Bankrupt's insolvency, your petitioner respectfully makes the following offer of proof:

"Petitioner offers to prove:

"1. That within four months of the filing of Bankrupt's petition herein, and more particularly between December 30, 1941, and the date upon which he filed said petition, April 29, 1942, and upon each and every intervening day, the aggregate of all Bankrupt's property, exclusive of the total sums conveyed by him to the Respondents herein, was not, at a fair valuation thereof, sufficient to pay his debts.

"2. That Respondents actually knew Bankrupt's financial condition was such that in January, 1942, he was compelled to and did close his business and had no money or property with which to pay all of his outstanding debts; that this condition existed not only at the time of the closing of the same, but also continually for more than one month prior thereto and continually thereafter up to and including April 29, 1942.

"3. That Respondents had reasonable cause to believe Bankrupt was insolvent within the meaning of the Bankruptcy Act, at the times they received said payments.

"4. That by the very manner in which Respondents obtained the preferential payments, and their activities leading up to their acquiring said payments, Respondents knew they were obtaining preferences.

"That said offer of proof is supported by the affida- [6] vit of Joseph Louis Scardino, the Bankrupt herein, and the same is hereto attached and made a part hereof.

"It is respectfully urged that these proceedings be certified to the United States District Court Judge, as in such cases made and provided, for a consideration of said order and the same be reversed, or in the event said United States District Court Judge should, under all of the facts and circumstances contained in the record and upon the consideration of those herein set forth, deem it proper in the premises that this matter be remanded to the Referee, then the record herein and the proceeding thereunder be returned to said Referee with instructions to take such further and other proceedings in accordance with Section 2.a(10) of the Bankruptcy Act, as may be proper in the premises.

"Wherefore, your petitioner prays for a review of said Order by the United States District Court Judge, and upon the consideration thereof, said Order be reversed, or should it appear to said United States District Court Judge that this matter is within the purview of Section 2.a(10) of the

Bankruptcy Act, and should said Judge deem it proper, then the record herein be returned to the Referee with instructions for further proceedings as may be appropriate in the premises, and for such other and further order for which no previous application has been made.

"G. S. HAYWARD
"Petitioner
"MAX H. MARGOLIS
"Attorney for Petitioner [7]

"United States of America
"Northern District of California
"City and County of San Francisco—ss.

"G. S. Hayward, being first duly sworn, deposes and says:

"That she is the petitioner named and described in the foregoing petition; that she has read the petition, knows the contents thereof and hereby makes solemn oath that the statements contained therein are true to the best of her knowledge, information and belief.

"G. S. HAYWARD

"Subscribed And Sworn to before me this 24th day of September, 1943.

"BURTON J. WYMAN
"Referee in Bankruptcy
"MAX H. MARGOLIS
1650 Russ Building
SU tter 3866
San Francisco, California
"Attorney for Trustee [8]

"In the Southern Division of The United States District Court, for the Northern District of California.

No. 34909-S—In Bankruptcy

In the Matter of

JOSEPH LOUIS SCARDINO

Bankrupt.

"AFFIDAVIT OF JOSEPH LOUIS SCARDINO

"United States of America
"Northern District of California
"City and County of San Francisco—ss.

"Joseph Louis Scardino, being first duly sworn, deposes and says:

"That I am the person named and described in the above entitled proceedings; that I filed my duly verified, voluntary petition herein on April 29, 1942, and was duly adjudicated a bankrupt by the above entitled Court on April 30, 1942.

"That for many months prior to February 16, 1942, my business as a plaster-contractor was steadily getting worse and a short time prior to that date, I called upon my attorney for counsel and advice regarding my general business affairs and the pressure being exerted upon me by several of my creditors, discussed with him the matters covering certain tax liabilities and the possible filing of a voluntary petition in bankruptcy, and left with him for inspection whatever books, records, papers and documents I then had, a portion of which had theretofore been placed for safe keeping in a friend's gar-

age under lock and key and when the door of the same was inadvertantly left unlocked said portion of said records were chewed up, mutilated and destroyed by a dog. That my attorney prepared my said voluntary petition and the accompanying schedules which I verified under oath on said February 16, 1942, and the same were duly filed as aforesaid on April 29, 1942. That for some time prior to said February 16, 1942, and up to and including said April 29, 1942, my attorney conducted negotiations with creditors to whom I was indebted for wage claims and with other creditors to whom I was, and continued [9] to be indebted for various taxes, all tending toward the settlement and liquidation of the same but without effect.

"That during the conferences had with my attorney, and within four (4) months of the filing of my said petition, I informed him that I was being hard pressed by certain of my general creditors and was requested to and did make substantial payments to H. E. Casey and Company, and San Mateo Feed & Fuel Co., also that they and each of them requested me to execute certain assignments conveying moneys due to me from one of my general contractors, and when I informed him that by virtue of said assignments and the payments made to them, their respective claims would be paid in full, and that there might possibly be a credit coming to me, I was advised that their names need not be listed in my schedules among the unsecured creditors or otherwise.

"That within four (4) months of the filing of my

said petition, and more particularly between December 30, 1941 and March 12, 1942, inclusive, said San Mateo Feed & Fuel Co., received the total sum of $1025.35 from me and from persons who were indebted to me in my operations as a plaster-contractor; and during said four (4) months period, and more particularly on or about January 20, 1942, and between February 18, 1942, and about March 14, 1942, said H. E. Casey and Company received the total sum of $2534.76 from me and from persons who were likewise indebted to me in my operations as a plaster-contractor; that during said times and on each of said dates respectively, the total fair market value of all my property, both real and personal, not including the aforesaid amounts paid to said creditors, was not sufficient to pay all of my debts. That on each [10] of said dates the total of all my debts, exclusive of the amounts owed to said creditors herein named, was the approximate sum of $3227.42. That on each of said dates the fair market value of all of my assets did not exceed the sum of $850, made up of the following: an unimproved piece of real property located at 9th and Bayshore Highway, San Mateo, California, standing of record in my name and the name of my wife, Nettie Scardino, as joint tenants, the fair market value of which was $250; a 1935 Chevrolet Truck, (1-1/2 Tons), the fair market value of which was $150; cash on deposit with the Bank of America N. T. & S. A., San Mateo Branch, San Mateo, California, in the approximate sum of $50, held under a writ of attachment which was levied more than four (4)

months prior to the filing of my said petition, and which was paid over to the State Compensation Insurance Fund on or about April 20, 1942, pursuant to a writ of execution issued out of the suit brought against me by said Fund; my tools, plaster boards, two water hoses, two hoes, mortar boards, mixing box, and mixed tools, the fair market value of which was $400, and which I claimed exempt.

"That during said four (4) month period and for many months prior thereto the credit managers of both of said creditors called upon me frequently and I advised them of my insolvent condition. Notwithstanding, they arranged with my general contractors that all moneys which were due and owing to me should be paid by checks drawn payable to me and them respectively, all without my consent and against my wishes and instructions.

"That I ceased operating my business as a plaster-contractor during the latter part of January, 1942, due to my financial inability to carry on the same, and this [11] fact, was at the time, well known to both of said creditors. That for at least thirty (30) days prior to said latter part of January, 1942, one Bud Murray, connected with said San Mateo Feed & Fuel Co., called on me twice and three times weekly regarding payment of my account with his firm, and I repeatedly advised him of my financial condition and informed him that I intended to and did close my business in January, 1942.

"That at no time, nor upon any date, between December 30, 1941, and the date of the filing of my

petition in bankruptcy, on said April 29, 1942, was the aggregate of all of my property at its fair market value, exclusive of the sums conveyed to the two creditors as aforesaid, sufficient in amount to pay all of my debts outstanding as of said time or times, date or dates.

"JOSEPH LOUIS SCARDINO

"Subscribed And Sworn to before me this 23rd day of September, 1943.

"LOUIS WIENER

"Notary Public In and for the City and County of San Francisco, State of California."

(See original of said petition, with exhibit attached thereto, and the original order of September 15, 1943, handed up herewith as a part of this certificate and report.)

DISCUSSION BY AND OPINION OF REFEREE

At the time I entered the complained-of order, I was of the opinion that, upon the evidence presented on April 12, 1943, [12] as such evidence is shown by the Reporter's Transcript, (handed up herewith as a part of this certificate and report), there was no order which legally I could enter other than the one dismissing the trustee's petition and discharging the order to show cause based on said petition. However, with the record in its present state—and I refer particularly to the affidavit of the bankrupt attached to the aforesaid petition for review—I am of the opinion that the court, in the interest of equity and justice, particularly, so far as creditors' rights are concerned, and also in the exercise of

sound discretion, is authorized by law to return the herein records, and the matters covered thereby, to me, as the referee in charge of these proceedings, with instructions to take such further proceedings as are warranted in the premises.

As legal justification for such procedure, see section 2a(10) of the Bankruptcy Act [11 USCA, §11a(10)].

PAPERS HANDED UP HEREWITH

The following papers are handed up herewith as a part of this certificate and report:

(1) Trustee's Petition for Turnover Order and Order to Show Cause on Trustee's Petition for Turnover Order;

(2) Affidavit of Mailing Notice of Trustee's Petition for Turnover Order;

(3) Answer of San Mateo Feed & Fuel Co., a Corporation to Trustee's Petition for Turnover Order;

(4) Answer of H. E. Casey Company to Trustee's Petition for Turnover Order;

(5) Reporter's Transcript of Examination Under 21(a);

(6) Reporter's Transcript of Hearing on Trustee's Petition for a Turnover Order to Recover Preferences;

(7) Trustee's Memorandum on Petition for a Turnover [13] Order to Recover Preferences;

(8) Memorandum in Opposition to Trustee's Memorandum;

(9) Letter dated May 13th, 1943, from Hugh F. Mullin, Jr., Esq., Attorney for H. E. Casey Co.;

(10) Trustee's Closing Memorandum;

(11) Order on Petition of Trustee and Order to Show Cause Based Thereon;

(12) Petition for Review of Referee's Order by United States District Judge, and

(13) Affidavit of Mailing.

Dated: September 30th, 1943.

Respectfully submitted,

BURTON J. WYMAN

Referee in Bankruptcy

[Endorsed]: Filed Sep. 30, 1943. [14]

[Title of District Court and Cause.]

TRUSTEE'S PETITION FOR TURNOVER ORDER

To the Honorable Burton J. Wyman, Referee in Bankruptcy:

The petition of G. S. Hayward, respectfully represents:

That on April 29, 1942, the above named bankrupt filed his voluntary petition in bankruptcy herein, and on April 30, 1942 was duly and regularly adjudicated a bankrupt; that on May 21, 1942, petitioner was duly appointed Trustee of the estate and effects of the above named bankrupt, and thereafter duly qualified and presented the Bond, required of her as such Trustee, which was approved

by the Court; that ever since said May 21, 1942, petitioner has been and now is the duly qualified and acting Trustee in these proceedings.

That on said April 29, 1942, the day of the filing of [15] bankrupt's petition in bankruptcy herein, said bankrupt had assets consisting of moneys assigned to H. E. Casey Company, 835 Woodside Way, San Mateo, California, in the sum of $2696.92, and moneys assigned to San Mateo Feed & Fuel Company, 850 San Mateo Drive, San Mateo, California, in the sum of $1279.47; that said assignments were made by said bankrupt to the respondents herein-above named within four (4) months of the filing of his petition in bankruptcy herein, without any consideration therefor, and petitioner alleges that upon the filing of bankrupt's said voluntary petition, said sums of $2696.92 and $1279.47, passed to the petitioner, as such Trustee herein, to be administered with the assets of this estate.

That at the time of the assignments hereinabove referred to, said respondents knew bankrupt was insolvent and caused said bankrupt to make said assignments without any consideration therefor. That said moneys so received by said respondents are held by them without color of right or title thereto and petitioner alleges that she is entitled to the immediate possession of the same.

Wherefore, petitioner prays for an order requiring the said H. E. Casey Company and the said San Mateo Feed & Fuel Company to appear before the Honorable Burton J. Wyman, Referee In Bankruptcy, at his Courtroom, #609 Grant Building, 7th & Market Streets, San Francisco, California, on

a day and at a time certain to then and there show cause, if any they or each of them have, why they and each of them should not be ordered to turn over to petitioner, as such Trustee the respective sums of $2696.92 and $1279.47 held by them to be administered in these proceedings, and for such other and further relief as may be just and proper in the premises, for which no previous application has been made.

G. S. HAYWARD
Petitioner
MAX H. MARGOLIS
Attorney for Petitioner [16]

United States of America
Northern District of California
City and County of San Francisco—ss.

G. S. Hayward, being first duly sworn, deposes and says:

That she is the petitioner named and described in the foregoing petition; that she has read the petition, knows the contents thereof and hereby makes solemn oath that the statements contained therein are true to the best of her knowledge, information and belief.

G. S. HAYWARD

Subscribed and Sworn to before me this 2nd day of April, 1943.

BURTON J. WYMAN
Referee in Bankruptcy

[Endorsed]: Filed with Referee Apr. 2, 1943.
[Endorsed]: Filed with Clerk Sep. 30, 1943.
[17]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE ON TRUSTEE'S PETITION FOR TURNOVER ORDER

Upon the reading, consideration and filing of the annexed verified petition of G. S. Hayward, Trustee of the estate of the above named bankrupt and upon all the proceedings heretofore had herein, and good cause appearing therefor,

It Is Hereby Ordered, that H. E. Casey Company 835 Woodside Way, San Mateo, California, and San Mateo Feed & Fuel Company, 850 San Mateo Drive, San Mateo, California, appear and show cause, if any they or each of them have, before the undersigned Referee in Bankruptcy at his Courtroom located at #609 Grant Building, 7th & Market Streets, San Francisco, California, on April 12th, 1943, at the hour of 2:00 P.M. of said day or as soon thereafter [18] as counsel may be heard, why they and each of them should not be ordered to turn over to the Trustee herein, the sums of $2696.92, and $1279.47 held by them respectively as more particularly described and referred to in said Trustee's verified petition;

It Is Further Ordered, that said respondents bring with them all of their books, records, and documents covering the moneys received by them under and by virtue of the assignments referred to in said Trustee's verified petition, including all of the information regarding the Notices of Completion in connection with the receipt of said moneys under and by virtue of said assignments;

It Is Further Ordered, that service of this order and annexed petition be made upon said respondents, H. E. Casey Company, 835 Woodside Way, San Mateo, California, and San Mateo Feed & Fuel Company, 850 San Mateo Drive, San Mateo, California, by mailing copies thereof to said Respondents and to F. E. Hoffmann, Esq., attorney for said latter respondent, 220—3rd Avenue, San Mateo, California, on or before April 2nd, 1943, be deemed good and sufficient service and the time for said service is hereby shortened accordingly.

Dated: San Francisco, California, in said District; April 2nd, 1943.

BURTON J. WYMAN
Referee in Bankruptcy

[Endorsed]: Filed with Referee Apr. 2, 1943.

[Endorsed]: Filed with Clerk Sep. 30, 1943.

[19]

[Title of District Court and Cause.]

ANSWER OF SAN MATEO FEED & FUEL CO., A CORPORATION, TO TRUSTEE'S PETITION FOR TURNOVER ORDER

Now comes San Mateo Feed & Fuel Co., a California Corporation, and for answer to Trustee's Petition for Turnover Order, admits, denies and alleges as follows, to-wit:

Said Corporation denies that on April 29, 1942, the day of the filing of bankrupt's petition in bankruptcy herein, said bankrupt had assets consisting

of monies assigned to San Mateo Feed & Fuel Co., a Corporation, in the sum of $1279.47, or in any other sum, or at all; denies that said assignments were made by said bankrupt to said respondent within four months of filing bankrupt's petition in bankruptcy, without any consideration therefor; denies that said alleged sum of $1279.47 passed to said petitioner to be administered with the assets of said estate; denies that at the time of the alleged assignments, respondents knew bankrupt was insolvent and/or caused said bankrupt to make said assignments without any consideration therefor, and in this connection alleges that on February 17, 1942, said bankrupt did make certain assignments to respondent herein of certain monies, which said monies were never paid to respondent pursuant [20] to said assignments; denies that said respondent received the money alleged to have been received in said petition, or any money at all pursuant to any assignments made by said bankrupt to respondent; denies that respondent holds any money received pursuant to any assignment; denies that the monies received by respondent from said bankrupt are held by it without color of right or title thereto; denies that petitioner is entitled to the immediate possession of any monies paid by said bankrupt to respondent.

Further answering said petition, respondent alleges that said bankrupt did pay certain money to respondent upon an open book account, but not pursuant to any assignment, and in this connection alleges that said payments were made by said bank-

rupt and received by said respondent on account of goods, wares and merchandise furnished said bankrupt by said respondent, and for a valuable consideration.

Wherefore, respondent prays that petitioner's order requiring San Mateo Feed & Fuel Co., a corporation, to turn over to petitioner as trustee, the sum of $1279.47 be denied, together with such other and further relief as to the court may seem proper.

SAN MATEO FEED & FUEL CO., a corporation,
By GEO. FERRIS
Vice-president-Respondent
F. E. HOFFMANN
Attorney for Respondent.

[21]

State of California
County of San Mateo—ss.

Geo. Ferris, being duly sworn, deposes and says:

That he is an officer of respondent, San Mateo Feed & Fuel Co., a corporation, to-wit, the vice-president thereof; and makes this verification for and on behalf of said respondent; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated upon information or belief, and as to such matters, that he believes it to be true.

GEO. FERRIS

Subscribed and sworn to before me this 9 day of April, 1943.

[Seal] F. E. HOFFMANN

Notary Public in and for the County of San Mateo, State of California.

[Endorsed]: Filed with Referee Apr. 10, 1943.

[Endorsed]: Filed with Clerk Sep. 30, 1943.

[22]

[Title of District Court and Cause.]

ANSWER OF H. E. CASEY COMPANY TO TRUSTEE'S PETITION FOR TURNOVER ORDER

Comes now H. E. Casey Company, a co-partnership, consisting of H. E. Casey and Angela E. Casey, and for answer to Trustee's Petition for Turnover Order, admits, denies and alleges as follows, to-wit:

Denies that on April 29th, 1942, the day of the filing of bankrupt's petition in bankruptcy herein, said bankrupt had assets consisting of monies assigned to H. E. Casey Company, a copartnership, in the sum of Two Thousand Six Hundred Ninety-six and 92/100 ($2,696.92) Dollars, or in any other sum, or at all; denies that said assignments were made by said bankrupt to said respondent within four months of filing bankrupt's petition in bankruptcy, without any consideration therefor; denies that said alleged sum of Two Thousand Six Hundred Ninety-six and 92/100 ($2,696.92) Dollars

passed to said petitioner to be administered with the assets of said estate; denies that at the time of the alleged assignments, respondents knew bankrupt was insolvent and/or caused said bankrupt to make said assignments without any consideration therefor, and [23] in this connection alleges that on February 20th, 1942, said bankrupt did make certain assignments to respondent herein for certain monies, which were due said bankrupt from Conway and Culligan, building contractors, and further alleges that said assignments were made in the ordinary course of business as conducted by this answering respondent and others dealing in the same type of business as respondent in the community in which respondent operates his said business; denies that respondent holds any money received pursuant to any assignment, save and except the sum of Two Thousand Thirty-five and 89/100 ($2,035.89) Dollars; denies that the monies received by respondent from said bankrupt are held by respondent without color of right or title thereto, and in this respect alleges that said sums received by respondent by virtue of said assignments were received in the ordinary course of business of respondent, that there was consideration for said assignment, and further alleges that said bankrupt is indebted to respondent in the sum of One Thousand Thirty-one and 52/100 ($1,031.52) Dollars as a balance due on an open book account; denies that petitioner is entitled to the immediate possession of any monies paid by said bankrupt to respondent.

Further answering said petition, respondent alleges that said bankrupt did pay certain monies to respondent upon an open book account, and that said payments were made by said bankrupt and received by said respondent on account of goods, wares and merchandise furnished said bankrupt by respondent and for valuable consideration.

Wherefore, respondent prays that petitioner's order requiring H. E. Casey Company to turn over to petitioner, as Trustee, the sum of Two Thousand Six Hundred Ninety-six and 92/100 ($2,696.92) Dollars be denied, together with such other and further relief as to the Court may seem proper.

H. E. CASEY COMPANY,
a co-partnership,
By H. E. CASEY
HUGH F. MULLIN, JR.
Attorney for Respondent [24]

State of California
County of San Mateo—ss.

H. E. Casey, being first duly sworn, deposes and says:

That he is one of the partners of H. E. Casey Company, a co-partnership, and that he makes this verification for and on behalf of said co-partnership; that he has read the foregoing Answer and knows the contents thereof, that the same is true of his own knowledge except as to matters therein

stated upon information or belief, and as to such matters he believes it to be true.

H. E. CASEY

Subscribed and sworn to before me this 12th day of April, 1943.

[Seal] HUGH F. MULLIN, JR.

Notary Public in and for the County of San Mateo, State of California.

[Endorsed]: Filed with Referee Apr. 12, 1943.

[Endorsed]: Filed with Clerk Sep. 30, 1943.

[25]

[Title of District Court and Cause]

ORDER ON PETITION OF TRUSTEE AND ORDER TO SHOW CAUSE BASED THEREON

This matter comes before the court on the petition of G. S. Hayward, the trustee of the estate of the above-named bankrupt, represented by Max H. Margolis, Esq., the order to show cause based upon said petition, the answer of San Mateo Feed & Fuel Co., a corporation, represented by F. E. Hoffmann, Esq., the answer of H. E. Casey Company, represented by Hugh F. Mullin, Jr., Esq., and the evidence taken upon said petition, order to show cause and said answers. The matter having been submitted on briefs, and the briefs having been filed and considered by the court in connection with the allegations of the petition, the answers thereto, and the evidence offered and received in connection

therewith, and the court being [26] fully advised in the premises, finds that no proof has been offered and/or received showing that, at the time either of the assignments referred to in said petition was made by said bankrupt, the aggregate of the property of said bankrupt, exclusive of any alleged property which said bankrupt may have conveyed, transferred, concealed, removed or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, if such said bankrupt did, then was not, at a fair valuation, sufficient to pay his debts.

Upon the record presented herein, the court concludes as a matter of law that such trustee, upon the petition and order to show cause now before the court, is not entitled to a turn-over of any part of the money referred to in either of the assignments referred to in said petition.

It, Therefore, Hereby Is Ordered, Adjudged and Decreed that the trustee's said petition be, and it is, Dismissed, and that the order to show cause based thereon, be, and it is, Discharged, without prejudice, in each instance, to said trustee's, within ten (10) days from date hereof, taking such further steps as said trustee may be advised in connection with each of said assignments, by virtue of the provisions of Section 70(e) of the Bankruptcy Act.

Dated: September 15, 1943.

BURTON J. WYMAN
Referee in Bankruptcy

[Endorsed]: Filed with Referee Sept. 15, 1943.
[Endorsed]: Filed with Clerk Sep. 30, 1943.

[27]

[Title of District Court and Cause.]

Thursday, May 21, 1942

General Examination

Appearances:

Renzo Turco, Esq.,

Attorney for Bankrupt. [31]

JOSEPH L. SCARDINO

Sworn.

The Referee: Q. Where do you live?

A. Menlo Park.

Q. What address? A. 1038 Curtis Street.

Q. What is your business?

A. Plaster contractor.

Q. Are you married? A. Yes.

Q. Your wife's name is what? A. Nettie.

Q. Did you ever file any other petition in bankruptcy? A. No, sir.

Q. Are you a citizen of the United States?

A. Yes.

Q. Do your schedules show the names of all of your creditors and the amounts due from you to them? A. Yes, sir.

Q. And do they show all of your assets, all of your property? A. Yes, sir.

Q. Is anybody holding any property in trust for you? A. No.

Q. Has anyone died and left you any money or other property? A. No, sir.

(Testimony of Joseph L. Scardino.)

Q. Did you have a bank account within a year preceding the filing of your petition in bankruptcy?

A. No, sir.

Q. Or did you have a safe deposit box within the same time? A. No, sir.

Q. Or within the same time have you transferred any real property, any land?

A. No, sir.

Q. Did you have any stocks, bonds, or securities of any kind whatsoever at the time you filed the petition in bankruptcy? A. No, sir.

Q. Or did you have any interest in any automobile at that time? A. No, sir.

Q. When was the last time you had an automobile? [32] A. The wife had one last year.

Q. She has not got it now? A. No.

Q. She did not have it when you filed the petition? A. No.

Q. Did you have any interest in the automobile?

A. No, I have not.

The Referee: Are there any creditors present who want to ask any questions? That is all. G. S. Hayward, Trustee, bond $100.00.

(Witness excused.) [33]

Tuesday, January 26, 1942
Examination under 21 (a)

Appearances:

Max H. Margolis, Esq., Attorney for Trustee;
Julian Pardini, Esq., Attorney for Bankrupt;
John J. Daly, Esq., Assistant Attorney General, State of California;
Esther B. Phillips, Assistant U. S. Attorney, appearing for Collector of Internal Revenue.

Mr. Margolis: Subpenas, Your Honor, were issued on the San Mateo Feed and Fuel Company. Is there a representative of that company here?

The Referee: Apparently not.

Mr. Margolis: There is a return of service on file, Your Honor.

The Referee: Well, prepare a certificate of contempt.

Mr. Margolis: I will make certain first. Is Mr. George Ferris here, of the San Mateo Feed and Fuel Company?

Is Mr. Harold E. Casey here?

HAROLD E. CASEY

called for the Trustee; sworn:

Mr. Margolis: Q. Did you bring with you documents and papers in connection with any transactions had with Mr. Scardino?

A. I brought the ledger cards showing the dates requested, December.

Q. May I see them, please?

A. That is the original.

Q. Did you bring with you any paper or docu-

(Testimony of Harold E. Casey.)

ment indicating an assignment of any kind from Mr. Scardino to the Casey Company?

A. We have one here. [34]

Q. May I see it? Where is the original of this, do you know, Mr. Casey? A. That is it.

Q. I mean the one bearing Mr. Scardino's signature?

A. I don't know. That is all that is in the file. This was honored and paid.

Q. May I withdraw it from that file?

A. Yes.

Mr. Margolis: I will read this into the record, Your Honor:

"February 18, 1942

"Conway & Culligan
Monadnock Building,
San Francisco, California

Attention: Mr. T. J. Culligan, Jr.

"This will authorize you to pay to the H. E. Casey Company the balance due them for material on each job in the order in which it falls due. The amount of money I owe them is listed as follows:

Job No.	Amount
1172	$ 28.64
1142	67.40
1149	204.97
1112	219.12
1139	31.21
1140	65.63
1143	42.22
1138	31.85

(Testimony of Harold E. Casey.)

1118	56.20
1141	7.43
1120	39.55
1136	60.40
1137	74.31
1131	191.05
1132	122.03
1133	119.71
1134	48.31
1130	200.29
1165	228.68
1129	180.82
1127	16.07
	$2,035.89

[35]

"All payments made to H. E. Casey Company to be credited to my account.

"Very truly yours,

.....

J. L. Scardino

445 Standish St.,

Redwood City, Calif.

Witness:....."

Mr. Pardini: That is not signed, this particular document.

Mr. Margolis: This particular document is a copy. The date is February 18, 1942.

Q. Can you enlighten us on this document in any respect, Mr. Casey?

(Testimony of Harold E. Casey.)

A. Well, Conway and Culligan would have the original.

Q. Now, did you get other or additional assignments except this?

A. There is one of these. I have a couple of those. Whether or not that is an assignment, I don't know.

Q. Do your records indicate, Mr. Casey, that the sum total of $2,035.89 was collected pursuant to the assignment I just read into the record?

A. I think, if I remember correctly, that was subject to an adjustment. What is the amount?

Q. $2,035.89?

A. Well, I know it was paid through Conway and Culligan and credited to his account.

Q. Did you set up a separate account for the assignment? A. Yes.

Q. Do you have that there?

A. No, I have not got that one. It was probably in the Conway and Culligan file.

Q. Would this add any light to the inquiry? That is attached [36] to the letter of February 18, 1942?

A. Well, $2,035.89. That is corrcet.

Q. $2,035.89? A. Yes.

Q. Your records reveal you have received that sum of money subsequent to February 18, 1942?

A. Prior to?

Q. After? A. After, yes.

Q. Have you anything there which would show

(Testimony of Harold E. Casey.)

us when you first started to receive payments under this copy of the assignment, dated February 18, 1942?

A. My recollection is it was paid in one check.

Mr. Margolis: I would like the record to show at this time, that Miss Phillips is here, representing the United States Government in connection with the tax claim of the Internal Revenue Collector, and Mr. John J. Daly is representing the State of California, pursuant to a claim filed in this matter for unemployment insurance.

Q. Can you tell us the date you received that sum of $2,035.89?

A. Not from the records I have here.

Q. Can we obtain the information, Mr. Casey?

A. I think we can.

Q. Would your records reveal the date?

A. They should.

Q. What is this you have handed me? It looks like a ledger card. A. That is right.

Q. Would that indicate the receipt of that?

A. No. I was looking for it here, but I do not see it. It might be made up in—we might have credited it in small items to show as a job.

Q. Could you obtain that information by telephone in order to avoid the necessity of coming back?

A. I could tell if it was credited in this ledger card or [37] some other source.

Q. Have you that other source with you?

A. No.

(Testimony of Harold E. Casey.)

Q. Could you obtain it?

A. No, because they have not the credit side.

Mr. Pardini: Q. Where are the credits?

A. I would have to check back to see.

Mr. Margolis: Q. I was under the impression you said you got the $2,035.89 in one lump sum payment?

A. That may be correct.

Q. But you allocated them?

A. We allocated them to the jobs, see.

Q. Wouldn't your deposit book, or any such record you may have at your office, show?

A. I might make this statement, that our office has been changed over two or three times, due to new help. I do not believe the ones there would know where to look.

Q. Can you tell us, Mr. Casey, how or in what manner that assignment was drawn?

A. In what way do you mean?

Q. Was that typed up in your office?

A. I would not be too sure, but what this was typed in Conway and Culligan's office.

Q. Were you present at the time?

A. No. A fellow named Jules Mendich, who was credit manager at that time.

Q. Can you tell us anything about the circumstances which resulted in drawing that assignment?

A. Well, as I remember, the jobs all of a sudden stopped, from lack of funds from Mr. Scardino, and there were labor bills to be paid and material bills to be paid, and Conway and Culligan assumed

(Testimony of Harold E. Casey.)

those obligations so as to keep themselves free of liens, you see. [38]

Q. In all events, this money was paid directly to you, was it not?

A. That is right. They paid, as I remember, the labor bills, also, that were incurred at that time.

Q. This money was due and owing from this firm to Mr. Scardino?

A. That is right. In other words, we either got our money or had lien rights on these particular jobs.

Q. You did not file liens?

A. We did not file liens; we got our check.

Q. What are these documents you handed me, Mr. Casey?

A. Those are a couple of jobs Mr. Scardino was doing for Mr. Schmidt, and at that time he gave us a series of these authorizations on the American Trust Company. We received them all except these two, which are still under suit with Mr. Schmidt.

Q. Who gave them to you, Mr. Scardino?

A. No, Mr. Schmidt. His signature is on them.

Q. In other words, they represent money, also?

A. They represented money due or against a lien on each particular job. On these last two jobs, if I remember right, they did not draw the money from the bank because they sold the house and got the money and then paid off.

Q. Were those moneys due and payable to Mr. Scardino, do you know?

(Testimony of Harold E. Casey.)

A. No, due and payable to H. E. Casey and Scardino.

Q. Before the assignment was made to Casey, did they represent moneys due Scardino?

A. That is right, and due to us.

Q. May I see those, please? Were these moneys received by H. E. Casey & Company?

A. Not those particular two amounts. [39]

Q. These two were not?

A. That is right. They are still outstanding.

Q. Do you know where Schmidt may be reached? Do your records indicate?

A. Well, that is R. Schmidt, isn't it? 1949-15th Street, San Francisco.

Q. These outstanding items represent what? $81.43, dated January 15, 1942, and the other for $81.43, dated the same date. Did you make an attempt to collect these items, Mr. Casey?

A. Yes, we have.

Q. What information, if any, did you receive?

A. Well, it is under suit now.

Q. Suit is pending? A. Yes.

Q. Where, here in San Francisco?

A. I tell you, it is really not a suit. Schmidt and his attorney, I cannot recall his name, put up a bond for $500 to clear us from the forfeit of any lien by us, so that money is on deposit between our attorney and his, to the settlement of the claim.

Q. You mean the bond to secure the claimants for these two? A. And other accounts.

Q. In which Mr. Scardino was interested?

(Testimony of Harold E. Casey.)

A. That is right.

Q. How many of these documents labelled American Trust Company, not negotiable, did you receive from Mr. Scardino?

A. The total is there, isn't it?

Q. Will you find it for me? I cannot see a total on this.

A. Maybe it is not. You had a total of $162.86, didn't you?

Q. The sum total of these two items here.

A. All right. There is another total of $252.35 and $246.50. Those together would make $661.71. Is that correct? [40]

Q. That is correct.

A. Then the $252.35 and the $246.50 are the ones paid, leaving $162.86 still open.

Q. Can you tell me when you received payment on those two items?

A. Well, it would be in December and January, I imagine.

Q. December, 1941 and January, 1942?

A. Yes, or maybe November and December. I could not tell from here.

Q. I wonder if you could ascertain the dates you received the payments?

A. I will see if I can check it through here. $252.37 on January 20.

Q. 1942? A. That is right.

Q. And the $246.50, do you find that item?

A. I don't find that one. It would be here in a series.

(Testimony of Harold E. Casey.)

Q. In all events, it was subsequent to the execution of these documents on January 15, 1942?

A. That is right.

Q. They are all executed on the same date, these blue documents? A. Yes.

Q. What activity, what particpation did you have in connection with the execution? Did you accompany Mr. Scardino?

A. No, these are drawn at the American Trust Bank.

Q. At whose instigation?

A. Schmidt and our man, Mendich. I don't know whether Scardino was there or not.

Q. Your man's name is what?

A. Mendich.

Q. Your man?

A. Yes. That would be the American Trust Company at Burlingame.

Q. Yes. Was Mr. Mendich present also when that assignment was executed here at the office in San Francisco?

A. Yes. Not here in San Francisco, Burlingame. [41]

Q. I have reference to this other document we spoke of a moment ago, the carbon copy of the assignment?

A. Oh, yes. That was drawn at their office in Burlingame Village.

Q. They have an office in Burlingame Village?

A. That is right.

(Testimony of Harold E. Casey.)

Q. Conway and Culligan?

A. That is right.

Q. Your man Mendich was there at the time of the execution? A. Yes.

Q. Did you yourself have conferences or conversations with Scardino in December, 1941 or January, 1942? A. Yes, a lot of them.

Q. You yourself did? A. Yes.

Q. At his home? A. No, my office.

Q. Can you tell us the content of those conversations?

A. Well, they might be relevant to jobs or payment on jobs. In other words, there was always money involved in them or telling him where a particular contractor was starting a job, where he could go and get some business for himself.

Q. Was there any conversation you had with him yourself in connection with the assignment which resulted in the payment to your company of that $2,035.89?

A. I don't think directly with Scardino but with Conway and Culligan.

Q. Did you direct Mr. Mendich to speak with him?

A. I am pretty sure at the time this was done, Mendich and Scardino were present.

Q. Did Mr. Mendich have these discussions with Mr. Scardino under your direction?

A. That is right.

Q. How can we ascertain? Will you get the

(Testimony of Harold E. Casey.)

information and [42] forward it to us in connection with the date of the payment of that $2,035.89?

A. I will find out and drop you a letter or phone you.

Mr. Margolis: I will appreciate that.

A. The date of this payment. That is all you want, this particular item?

Q. The payment received by yourselves.

A. Yes.

Mr. Margolis: Are there any questions, Miss Phillips?

Miss Phillips: I am just new at this, Your Honor. This is the first time I have been at any of these meetings.

The Referee: Take your time.

Miss Phillips: Q. I wanted to ask the witness, you got assignments of various items on different jobs. Mr. Scardino was engaged in those jobs; you got the assignment of money due to him. Is that right?

A. Mr. Scardino is a plaster contractor; we are material dealers selling Mr. Scardino on these particular jobs being completed for Conway and Culligan, in which we had money due for materials furnished.

The Referee: Q. From Mr. Scardino?

A. That is right, or had our lien rights against the property.

Miss Phillips: Q. That was my understanding of what you said. This assignment, dated the 18th

(Testimony of Harold E. Casey.)

day of February, 1942. How long before the 18th day of February, 1942, that is the date of the assignment, had you supplied these building materials to Mr. Scardino?

A. I imagine maybe five or six years. Not in this particular tract. You mean how long have I been selling to him?

Q. No, I mean on February 18, 1942, how much did Mr. Scardino [43] owe your firm?

A. On February 18th?

Q. Yes. How much was he indebted to your firm at that time, the date of the assignment? How much did he owe you at that time?

A. Well, on January 31st we had $4,308.73.

Q. Now that total, $4,308.73, that is an indebtedness created during what period of time? How long outstanding was that indebtedness of $4,308.73?

A. Well, I imagine, as I say, probably four or five years. In other words, we had been doing business with him and at no time—go back to October, 1941. There are other ledger cards. At no time had Mr. Scardino ever balanced off. In other words, I show on October 25 here a balance of $4,585.46 in 1941.

Q. How much had he paid you between the 25th of October and the first of February?

A. Well, I would have to have an adding machine to do that. I could not tell you.

The Referee: Q. Have you the records there?

A. Yes, but I would have to add it all up.

(Testimony of Harold E. Casey.)

The Referee: How long would it take? We have an adding machine here.

Miss Phillips: Q. You see, what I am getting at is, you say the first of February he owed you $4,300 plus?

A. That is right.

Q. That, presumably, was about what he owed you on the 18th of February?

A. That is right.

The Referee: You mean October.

Miss Phillips: No, he said January 31st Mr. Scardino owed $4,308.

The Witness: A. That is right.

Miss Phillips: Q. I asked over how long a period that [44] had been built up and he said four or five years. In October Mr. Scardino owed $4,500.

What I am getting at, how much was paid off in that time? How old is this indebtedness?

A. May I say this. During this period we were furnishing other jobs besides the particular jobs the assignments were on. In other words, he had then thousands of dollars beyond that which were being paid and carried on. Do you get my point?

Q. Yes. Am I to understand then that the assignment of money that you got in February, 1942, those assignments may have gone to pay debts created perhaps two or three years before that?

A. No, the assignment is specific in naming the particular jobs, so the money was paid on the particular jobs under construction for Conway and Culligan, no one else, no other jobs.

(Testimony of Harold E. Casey.)

Q. Now, you had supplied materials that had gone into those particular jobs?

A. That is right.

Q. At that time?

A. That is right. And that is money due us on particular jobs and was the amount of the assignment at that time, and he had been doing jobs prior to that maybe five or six months, which we previously had received money for. Are you clear now?

Q. How long had the work been going on on the job numbers you have given us?

A. If I remember right, I think they started that subdivision in there and were operating maybe four months prior to that, March 5.

Q. Each one of these job numbers represents a different house?

A. Each represents a house.

Q. A structure of some kind in which building materials have [45] gone into?

A. That is right. So the particular assignment had nothing to do with any other amounts we might carry on our ledger. That was a specific payment.

Q. Was the firm of Conway and Culligan, were they the main contractors doing the buildings?

A. They were the contractors; Mr. Scardino was doing the plastering work for them.

Q. He was in the nature of a subcontractor for them? A. That is right.

Miss Phillips: Q. I think that is all, your Honor.

(Testimony of Harold E. Casey.)

The Referee: Any other questions, Mr. Margolis?

Mr. Margolis: Q. Any payments that were made from time to time, whether under those assignments or other moneys you had theretofore received from Mr. Scardino, were credited to him?

A. That is right.

Q. In other words, this was an open account?

A. That is right.

Q. Will you ascertain and let us know when you received the $2,035 as well as the $246.50?

A. That was on the Schmidt.

Q. That is right. You gave us January 20, 1942, for the $252.35? A. Yes.

Mr. Margolis: No further questions.

Mr. Pardini: Q. You ascertain the amount of $252.35 having been received January 20, 1942 from the general account or ledger account on Scardino?

A. Having that in one.

Q. Because that happened to be a single, separate payment? A. That is right.

Q. The other payments all being included in some other [46] payment or just lumped with some other sums perhaps? A. Yes.

Q. But they will be contained on the ledger statements you do have, and that, by the way, is a general account of Scardino owing to you people and showing any amounts received by you that were to be credited to the general account of Scardino? A. That is right.

(Testimony of Harold E. Casey.)

Q. That will also contain, among other collections, the sum of $2,035 which you got from Conway and Culligan? A. That is right.

Q. And that will be contained on this sheet you are holding?

A. That is right. That $235 you asked for, probably was not made in one payment.

Q. $252.35 appeared to be made in one payment?

A. I may be wrong even in that. $252.37 and $252.36 is so close.

Q. In other words, there might have been a small adjustment of a few cents. But, in other words, this ledger card you now have, being two sheets of the ledger account of J. L. Scardino, address 445 Standish, Redwood City, California, starts with a balance of $3,905.10 owing by Scardino to you people on October 15, 1941?

A. Right.

Q. And continues right down to October 23, 1942, when there still was a balance owing of $1,031.52?

A. That is what Mr. Scardino owes us at the present time.

Q. In between there are represented the charges against Mr. Scardino for his materials that he bought from your concern and the credits to Mr. Scardino's account from whatever source received?

A. That is right.

Mr. Pardini: I am representing Mr. Scardino in this [47] matter.

(Testimony of Harold E. Casey.)

The Referee: Yes, I know, Mr. Pardini.

Mr. Margolis: Q. Where did the suggestion come from for the execution of that assignment, do you know, Mr. Casey? A. Which one?

Q. The one that has the lot numbers on?

A. Conway and Culligan's?

Q. That is correct.

A. Well, at the time Mr. Scardino was having his trouble, not paying labor bills and material bills, we went to Conway and Culligan and demanded the money or we would have to proceed with our lien rights.

Q. Those troubles you spoke of occurred about the time it was executed?

A. That is right, prior to that.

Q. January?

A. February, I think, is the date.

Q. Along in January when those non-negotiable documents were executed on the form of the American Trust Company?

A. That is right.

Mr. Margolis: That is all.

The Witness: Now, do you want those ledger cards?

Mr. Pardini: I think we should have a photostatic copy.

The Witness: May I say, I have a duplicate, so may I leave that and keep the original?

Mr. Pardini: Yes, I would appreciate it.

The Witness: I had it made up. I thought you might want it.

(Testimony of Harold E. Casey.)

Mr. Pardini: May we then offer this in evidence as the trustee's exhibit in lieu of the information contained in the original file?

The Referee: Marked Trustee's Exhibit No. 1 on the 21 (a) examination. [48]

TRUSTEE'S EXHIBIT No. 1

Established
20 years

Andrew J. Conway
Thomas J. Culligan, Jr.

Conway & Culligan
Real Estate - Loans - Insurance - Homes
Built and Financed

Burlingame Village,
Burlingame, Calif.
Telephone DOuglas 4941
Monadnock Building
San Francisco

February 20th, 1942

Conway & Culligan
681 Market Street
San Francisco, Calif.

Gentlemen:

You are hereby authorized to pay from any amounts due me for work on your jobs the monies or any part thereof due the following business firms:

San Mateo Feed & Fuel Co.
Frank Perry
H. E. Casey Co.

and all labor bills, and charge same to my account.

In consideration of your paying whatever monies

(Testimony of Harold E. Casey.)

is due me on the above accounts, I shall expect you to hold me harmless provided the statement I have rendered you is correct.

J. L. SCARDINO

Accepted:

T. J. CULLIGAN, JR.

Witness:

J. G. MINDNICE

Mr. Pardini: May I ask one more question?

Q. Mr. Scardino was having difficulty, as was well known, not only on the Conway and Culligan accounts, but on his general business at that time?

A. That is right.

Q. When those things happen in the trade, everyone knows about it? A. That is right.

Q. Mr. Mendich is your credit manager? That is his particular phase, to investigate the business and credit standing of all contractors?

A. That is right.

Q. And to safeguard and protect your concern if possible? A. That is right.

Mr. Pardini: That is all.

(Witness excused)

JOSEPH L. SCARDINO

Called for the Trustee; sworn.

Mr. Margolis: May I borrow the carbon copy of that assignment dated February 18th to refresh Mr. Scardino's memory?

Q. Mr. Scardino, I show you a carbon copy of a document dated February 18, 1942, and ask you whether you ever saw that or the original of it?

A. They make one like this that they make me sign. My signature is signed by me.

Q. Where was that done?

A. In the office of Conway and Culligan in Burlingame Village.

Q. Who was present at that time?

A. Mr. Mendich was there, and Mr. Conway, and Culligan, too.

Q. Mr. Mendich was credit manager for Casey & Company?

A. That is right. So they discussed the thing and Conway and Culligan draw this thing right in Burlingame Village.

Q. Under whose direction, Mr. Mendich's? [49]

A. Well, Mr. Mendich's probably, with Mr. Casey, to protect themselves to have this assignment.

Q. You say you signed the original of it?

A. Yes.

Q. Who did you give it to, Mr. Mendich?

A. I gave one to Mr. Mendich and one to Conway and Culligan. There was three forms that Mr. Casey he got assignments from five or six more different contractors; one from Schmidt, one from

(Testimony of Joseph L. Scardino.)

Donald Johnson, one from Gus Johnson, and Stanley Younger.

Q. Younger?

A. Yes, I cannot spell his name. He came in with a bunch of assignments and I signed each one separate for each contractor.

Q. Were all these assignments made at the same time? A. I signed at the same time.

Q. The same day? A. The same day.

Q. The same place?

A. The same place. Finally it was in my house.

Q. Just a moment. You say you also executed an assignment in favor of H. E. Casey & Company for moneys coming from Mr. Schmidt?

A. Yes.

Q. From Donald Johnson? A. Yes.

Q. Gus Johnson? A. Yes.

Q. And Stanley Younger? A. Yes.

Q. Were they similar in form as the one you examined?

A. I think it was a little different. If I remember right, it was kind of a half-paper. Maybe I am wrong, but it was not the same form of this. Saying, the right to Mr. Casey to collect the money from each individual contractor.

Q. Who drew up the paper you signed?

A. Mr. Mendich, I suppose. [50]

Q. Where were they presented to you, in the office of Casey & Company, or where?

A. No, in front of my house.

Q. They came to your house?

(Testimony of Joseph L. Scardino.)

A. They came to my house.

Q. Who was there besides you and Mr. Mendich?

A. Nobody else.

Q. Then where were they signed, inside your home?

A. We were on the street. We go in the front-room and stayed inside a few minutes and signed right there.

Q. Have you copies of those?

A. Those copies were destroyed.

Q. You lost them, did you?

A. I lost them.

Q. Who retained the originals?

A. Mr. Casey, I suppose.

Q. Wait a minute. You say Mr. Mendich was there and yourself. Is that all? A. Yes.

Q. You signed the originals and turned them over to Mr. Mendich? A. Yes.

Q. Can you tell approximately what month that took place?

A. Well, I would say around February.

Q. February of 1942?

A. Yes, somewhere around there.

Q. Was this Sunday or a holiday that Mr. Mendich called at your home?

A. No, I think it was a working day.

Q. In the morning or at night?

A. At night, around 6:30 in the evening.

Q. Can you tell the contents of any of those documents, to whom they were addressed, or what the documents contained?

(Testimony of Joseph L. Scardino.)

A. No, I cannot; I don't know.

Mr. Margolis: Do you know of any such assignments, Mr. Casey, that Mr. Scardino now mentions?

Mr. Casey: I am trying to find them. I don't see any. I have some correspondence with Schmidt asking for money in [51] one place and another, where we received $200.16.

Mr. Margolis: From whom?

Mr. Casey: Well, that was February 17, jobs 24 and 25.

Mr. Margolis: Whom did you receive that money from?

Mr. Casey: A. R. Schmidt.

Mr. Margolis: Was that pursuant to an assignment?

Mr. Casey: Well, I say I don't know about the assignment.

Mr. Margolis: Is Mr. Mendich still in your employ, Mr. Casey?

Mr. Casey: No, he is not.

Mr. Margolis: Do you know where he may be located?

Mr. Casey: The Western Pipe.

Mr. Margolis: Western Pipe & Steel? Do you have his home address at your office?

Mr. Casey: His address is in the phone book. It would be under Lang Realty Company, Burlingame.

Mr. Margolis: You say the Lang Realty would know his address?

Mr. Casey: No, that is his address. The San Mateo telephone book under Lang Realty Company,

(Testimony of Joseph L. Scardino.)

on Ralston Avenue. That would be his address.

Mr. Margolis: Now, a search of your file does not reveal any assignments mentioned a few minutes ago by Mr. Scardino with respect to Stanley Younger?

Mr. Casey: I might say, there was an assignment; it is not here, but we received it, I just happened to remember while you were speaking about it, for $158.39 in October, which was credited to his account.

Mr. Margolis: October of what year, this year? [52]

Mr. Casey: No, 1942.

Mr. Margolis: What was the amount?

Mr. Casey: $158.39.

Mr. Margolis: That was under an assignment, also?

Mr. Casey: It was not under an assignment; it was a lien.

Mr. Margolis: You filed a mechanic's lien on the job?

Mr. Casey: Yes.

Mr. Margolis: You got your money in payment of the lien?

Mr. Casey: Yes.

Mr. Margolis: A mechanic's lien, regularly recorded?

Mr. Casey: That is right.

Mr. Margolis: Then you executed a release on receiving payment?

Mr. Casey: That is right.

(Testimony of Joseph L. Scardino.)

Mr. Margolis: That was received from whom, Schmidt?

Mr. Casey: No, that was from Stanley W. Younger.

Mr. Margolis: Did you say October, 1942 or 1941 you got that $158.39?

Mr. Casey: 1942.

Mr. Margolis: Have you got a copy of the lien that you filed, or a copy of the recorded notice of the filing of the lien?

Mr. Casey: I would have that in the office. How that came to be so late, if you are interested in the information——

Mr. Margolis: Yes.

Mr. Casey: Younger was in trouble, too, and there was a stoppage of work there and in two or three days we learned what was going on, filed our lien, so we collected our money. [53]

Mr. Margolis: You filed no lien on the Schmidt transaction nor the other transactions covering the $2,035.89?

Mr. Casey: No.

Mr. Margolis: No lien at all?

Mr. Casey: No.

Mr. Margolis: This $215.16 on February 16th just mentioned, was that 1942?

Mr. Casey: That was on Schimdt's, wasn't it?

Mr. Margolis: I believe you mentioned that the first one.

Mr. Casey: That was February 17, 1942, we acknowledged receipt of $216.

(Testimony of Joseph L. Scardino.)

Mr. Margolis: And was that pursuant to a materialmen's lien that you filed?

Mr. Casey: No, no, because it reads, "We hereby relieve you of any material furnished this particular job."

Mr. Margolis: Schmidt sent it to you directly?

Mr. Casey: What happened on those particular checks, he would make the check in the name of Scardino, endorse it, and we would take it.

Mr. Margolis: What I am interested in, Mr. Casey, is this: I notice the assignment is dated February 18, 1942. Now, you mention an additional item which you say you received February 17th. Was there an assignment in connection with that February 17th, or did you receive that in the regular course?

Mr. Casey: In the regular course.

Mr. Margolis: Directly from Mr. Schmidt?

Mr. Casey: That is right.

Mr. Margolis: Q. Have you any papers or documents in [54] connection with these matters there, Mr. Scardino, or did you lose them all?

The Witness: A. I lost all. I have all in one box. One day, as I told you, I left it with some friend of mine and his dog got hold of them.

Q. And chewed them up?

A. And chewed them up.

Mr. Pardini: Some considerable papers were turned over.

Mr. Margolis: I have in mind these particular ones.

(Testimony of Joseph L. Scardino.)

Mr. Pardini: I know, but all the remainder available. Some are usable and some are not. They were turned over and what few are left are always available, of course.

Mr. Margolis: Now, I think we can get the testimony in regard to conversations with the San Mateo Feed & Fuel, or shall we let it go? That is all at this time, Your Honor. Do you wish to ask a question?

Miss Phillips: No.

Mr. Pardini: He will be avalable and will come back some other time; will you not, Mr. Scardino?

The Witness: A. Any time that is convenient.

The Referee: We will let you go, with the understanding that we will notify you.

Mr. Pardini: Notify me.

The Witness: Notify me any time.

(Concluded)

[Endorsed]: Filed with Referee May 21, 1943.

[Endorsed]: Filed with Clerk Sep. 30, 1943.

[55]

District Court of the United States, Northern District of California, Southern Division.

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 4th day of October, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable A. F. St. Sure, District Judge.

[Title of Cause.]

No. 34909.

ORDER OF RE-REFERENCE ON PETITION FOR REVIEW

This matter came on regularly this day for hearing on the Referee's Certificate on Petition for Review, whereupon the Court ordered that the Record of Proceedings herein be returned to the Referee for further proceedings, in accordance with his request and Title 11 U.S.C.A., Sec. 11 (10).

[56]

[Title of District Court and Cause.]

CERTIFICATE AND REPORT OF REFEREE ON PETITION FOR REVIEW FILED ON BEHALF OF SAN MATEO FEED AND FUEL CO. ON FEBRUARY 26, 1944

To Honorable A. F. St. Sure, United States District Judge for the Northern District of California:

I, Burton J. Wyman, one of the referees in bankruptcy of this court, and the referee in charge of this proceeding, hereby respectfully certify and report that: [57]

On April 2nd, 1943, the following verified petition was filed herein:

"The petition of G. S. Hayward, respectfully represents:

"That on April 29, 1942, the above named bankrupt filed his voluntary petition in bankruptcy heerin, and on April 30, 1942, was duly and regularly adjudicated a bankrupt; that on May 21, 1942, petitioner was duly appointed Trustee of the estate and effects of the above named bankrupt, and thereafter duly qualified and presented the Bond, required of her as such Trustee, which was approved by the Court; that ever since said May 21, 1942, petitioner has been and now is the duly qualified and acting Trustee in these proceedings.

"That on said April 29, 1942, the day of the filing of bankrupt's petition in bankruptcy herein, said bankrupt had assets consisting of moneys assigned to H. E. Casey Company, 835 Woodside Way, San Mateo, California, in the sum of $2696.92, and moneys assigned to San Mateo Feed & Fuel Company, 850 San Mateo Drive, San Mateo, California, in the sum of $1279.47; that said assignments were made by said bankrupt to the respondents hereinabove named within four (4) months of the filing of his petition in bankruptcy herein, without any consideration therefor, and petitioner alleges that upon the filing of bankrupt's said voluntary petition, said sums of $2696.92 and $1279.47, passed to the petitioner, as such Trustee herein, to be administered with the assets of this estate.

"That at the time of the assignments hereinabove referred to, said respondents knew bankrupt was insolvent and caused said bankrupt to make said assignments without any consideration therefor. That said moneys so received [58] by said

respondents are held by them without color of right or title thereto and petitioner alleges that she is entitled to the immediate possession of the same.

"Wherefore, petitioner prays for an order requiring the said H. E. Casey Company and the said San Mateo Feed & Fuel Company to appear before the Honorable Burton J. Wyman, Referee In Bankruptcy, at his Courtroom, #609 Grant Building, 7th & Market Streets, San Francisco, California, on a day and at a time certain to then and there show cause, if any they or each of them have, why they and each of them should not be ordered to turn over to petitioner, as such Trustee the respective sums of $2696.92 and $1279.47 held by them to be administered in these proceedings, and for such other and further relief as may be just and proper in the premises, for which no previous application has been made.

"G. S. HAYWARD
"Petitioner
"MAX H. MARGOLIS
"Attorney for Petitioner"

[Verification omitted for sake of brevity.]

(See original of said petition on file in the office of the Clerk of this Court.)

Subsequently, but on said last mentioned date, the following order to show cause, based on said petition, was filed herein:

"Upon the reading, consideration and filing of

the annexed verified petition of G. S. Hayward, Trustee of the estate of the above named bankrupt and upon all the proceedings heretofore had herein, and good cause appearing therefor,

"It Is Hereby Ordered, that H. E. Casey Company, 835 Woodside Way, San Mateo, California, and San Mateo [59] Feed & Fuel Company, 850 San Mateo Drive, San Mateo, California, appear and show cause, if any they or each of them have, before the undersigned Referee in Bankruptcy at his Courtroom located at #609 Grant Building, 7th & Market Streets, San Francisco, California, on April 12th, 1943, at the hour of 2:00 P.M. of said day or as soon thereafter as counsel may be heard, why they and each of them should not be ordered to turn over to the Trustee herein, the sums of $2696.92, and $1279.47 held by them respectively as more particularly described and referred to in said Trustee's verified petition;

"It Is Further Ordered, that said respondents bring with them all of their books, records, and documents covering the moneys received by them under and by virtue of the assignments referred to in said Trustee's verified petition, including all of the information regarding the Notices of Completion in connection with the receipt of said moneys under and by virtue of said assignments;

"It Is Further Ordered, that service of this order and annexed petition be made upon said respondents, H. E. Casey Company, 835 Woodside Way, San Mateo, California, and San Mateo Feed & Fuel Company, 850 San Mateo Drive, San Mateo,

California, by mailing copies thereof to said Respondents and to F. E. Hoffman, Esq., attorney for said latter respondent, 220 - 3rd Avenue, San Mateo, California, on or before April 2nd, 1943, be deemed good and sufficient service and the time for said service is hereby shortened accordingly.

"Dated: San Francisco, California, in said District; April 2nd, 1943.

"BURTON J. WYMAN

"Referee in Bankruptcy"

[60]

(See original of said order to show cause on file in the office of the Clerk of this Court.)

Thereafter, and on April 10, 1943, the following verified answer was filed herein on behalf of San Mateo Feed & Fuel Co.:

"Now comes San Mateo Feed & Fuel Co., a California Corporation, and for answer to Trustee's Petition For Turnover Order, admits, denies and alleges as follows, to-wit;

"Said Corporation denies that on April 29, 1942, the day of the filing of bankrupt's petition in bankruptcy herein, said bankrupt had assets consisting of monies assigned to San Mateo Feed & Fuel Co., a Corporation, in the sum of $1279.47, or in any other sum, or at all; denies that said assignments were made by said bankrupt to said respondent within four months of filing bankrupt's petition in bankruptcy, without any consideration therefor; denies that said alleged sum of $1279.47 passed to said petitioner to be administered with the assets of said estate; denies that at the time of the alleged

assignments, respondents knew bankrupt was insolvent and/or caused said bankrupt to make said assignments without any consideration therefor, and in this connection alleges that on February 17, 1942, said bankrupt did make certain assignments to respondent herein of certain monies, which said monies were never paid to respondent pursuant to said assignments; denies that said respondent received the money alleged to have been received in said petition, or any money at all pursuant to any assignments made by said bankrupt to respondent; denies that respondent holds any money received pursuant to any assignment; denies that the monies received by respondent from said bankrupt are held by it without color of right or title thereto; denies [61] that petitioner is entitled to the immediate possession of any monies paid by said bankrupt to respondent.

"Further answering said petition, respondent alleges that said bankrupt did pay certain money to respondent upon an open book account, but not pursuant to any assignment, and in this connection alleges that said payments were made by said bankrupt and received by said respondent on account of goods, wares and merchandise furnished said bankrupt by said respondent, and for a valuable consideration.

"Wherefore, respondent prays that petitioner's order requiring San Mateo Feed & Fuel Co., a corporation, to turn over to petitioner as trustee, the

sum of $1279.47 be denied, together with such other and further relief as to the court may seem proper.

"SAN MATEO FEED & FUEL CO., a corporation,
By GEO. FERRIS
"Vice-president
Respondent
"F. E. HOFFMANN
"Attorney for Respondent."

[Verification omitted for sake of brevity.]

(See original of said answer on file in the office of the Clerk of this Court.)

Later, and on April 12, 1943, there then being present in court Max H. Margolis, Esq., the attorney for the trustee, F. E. Hoffman, Esq., the attorney for San Mateo Feed & Fuel Co., Hugh F. Mullin, Jr., Esq., the attorney for H. E. Casey Company, the other respondent named in the aforesaid petition and order to show cause, and Julian Pardini, Esq., the attorney for the bankrupt, the following proceedings were had: [62]

"Mr. Mullin: If Your Honor please, I would like to file the answer of H. E. Casey Company to the petition.

"Mr. Pardini: In view of the allegations, I received a copy of the petition of the trustee here, and having entered into the matter late, I am going to prepare a petition to Your Honor to amend the petition and set forth, possibly, the claims of the two people cited here and others in the same class.

"The petition originally filed shows that it evidently was put together in a hurry and there is nothing to show there was at that time a balance due at that time and it should have been put in. Whether or not the debtor thought there was at that time, there was a technical existence of a creditor-debtor relation, which the schedules do not show.

"The Referee: Will it interfere with your hearing today?

"Mr. Margolis: Not at all.

"The Referee: Put on your first witness.

"JOSEPH L. SCARDINO

"Called for the Trustee; sworn.

"Mr. Margolis: I wonder if either of you two gentlemen, or you, Mr. Hoffman, have the original assignment, or will you see if you can find something similar to that in your file?

"Mr. Hoffman: I never have seen anything like this. I think Mr. Mullin has the assignment, but this pertains to the H. E. Casey Company.

"Mr. Margolis: Yes. I thought perhaps there was something similar to that document that I hold in my hand with reference to certain assignments made respecting your client.

"Mr. Hoffmann: We might expedite this thing some. The only assignments the San Mateo Feed & Fuel Company have in their file are dated, all of them, February 17, 1942, [63] which I have here, and total $1,673. There have been no payments received on account of any of those assign-

(Testimony of Joseph L. Scardino.)

ments. However, since preparing my return, Judge Mullin called my attention to an assignment here from Conway and Culligan which mentions the San Mateo Feed & Fuel Company, but in no specific amount.

"Now, Scardino, in the San Mateo Feed & Fuel, had an open account. I brought the ledger sheets dating from February 20—no, December 1st, 1941, and continuing through to October 27, 1942. That was the last entry and that was a cash receipt. This is just part of the ledger sheets. It runs over a period of five years, roughly. The payments shown on here, all credited, and there is only one payment received after February 20. There is only one payment received after the date of the assignment Mr. Mullin has. This I never have seen before.

"I might explain that this way, if Your Honor please: The credit manager formerly in charge of the credits of the San Mateo Feed & Fuel Company no longer is with them. I don't know exactly where he is at the present time, and these records I have here are for the most part—well, they are just the regular ledger. Pursuant to the order, we have searched the files and I have here the only assignments, apparently, that are in the files of the corporation. None of them pertain to any of the payments that were made here. Now, as I say, Mr. Mullin dug up an assignment from Conway and Culligan which does not refer to a specific amount, but recognizes an indebtedness outstanding, and apperently no moneys were paid to the San Mateo Feed & Fuel Company under that assignment.

(Testimony of Joseph L. Scardino.)

"Mr. Margolis: Perhaps we can speed this up. At the last hearing neither counsel were present and this may take [64] a little time to refresh their memories. Mr. Mullin, at the last hearing, Mr. Casey produced their file. That is correct, is it?

"Mr. Mullin: An unexecuted assignment.

"Mr. Margolis: I now wish to follow it. You may have a copy of it.

"Mr. Mullin: That is an unexecuted copy.

"Mr. Margolis: Yes. I will inquire about the original.

"Mr. Margolis: Q. Did you ever see this document, Mr. Scardino? You will recall we questioned you about that document at the last hearing some weeks ago.

"The Witness: A. I don't recall this. I don't recall seeing this. I saw some similar that he sent to the house. That is the balance due on the San Mateo Feed & Fuel.

"Q. Did you see the original of that? That purports to be a carbon copy.

"Mr. Hoffman: Q. That is the balance due on the H. E. Casey Company, isn't it?

"A. I did see one, but I could not say.

"Mr. Margolis: Q. Did you sign a document similar to that at any time?

"A. I signed a bunch of them similar to that, which was smaller than this, which the bookkeeper from Casey Company came down to the house and he wants me to sign all these papers, I recall it, to individual general contractors.

(Testimony of Joseph L. Scardino.)

"Q. Did you have the original of that document at any time? A. No, I did not.

"Q. Did you ever sign the original?

"A. I keep one and signed. He kept the other.

"Q. Did you sign one?

"A. Yes, I did sign all.

"Q. Now, whom did you give them to? [65]

"A. To the bookkeeper, whoever was in charge of the collections.

"Q. Do you know the name of the bookkeeper?

"A. I don't recall. I think you got it in the book there.

"Q. Do you know who Jules Mendich is?

"A. Jules Mendich.

"Q. Is that the man you spoke to?

"Mr. Mullin: We will stipulate that he was the bookkeeper at that time for H. E. Casey Company.

"The Witness: A. I don't know his name.

"Mr. Margolis: Q. Did you hand him the original of this document? A. Yes.

"Q. Do you know what happened to it?

"A. I don't know what happened to it. I told you mine was destroyed by an accident.

"Q. No, about the original, Mr. Scardino?

"A. I don't know.

"Q. That was executed, was it, on the date written on the top of it, February 18th?

"A. February? I cannot see very good.

"The Referee: February 29th?

"Mr. Mullin: February 18th on this.

(Testimony of Joseph L. Scardino.)

"Mr. Margolis: February 18, 1942.

"The Referee: Oh, yes, February 18, 1942.

"Mr. Margolis: Q. The original of this was signed on or about that date? A. Yes.

"Q. Did you have any conversations with this gentleman prior to this date?

"A. On that day, no.

"Q. Prior to that date, did you have conversations with him in connection with the money you owed H. E. Casey & Company?

"A. He used to come and complain the account was too big, I will have to pay this bill. I told him I am broke, [66] I have no money. If I cannot collect, I cannot pay.

"Q. You say he used to come, where, to your home?

"A. Sometimes he came to my home and could not find me and he looked around on the jobs until he met me, which was mostly 39th Avenue, or Conway and Culligan's, any place he could get hold of me.

"Q. What was the extent of the conversation? What did you say to him?

"A. He say: 'We have to get some money; we cannot go on like this.' I say: 'I cannot help it. I got no money; I am broke.'

"Q. And how long prior to February 18, 1942, did this conversation take place? Was it a month before?

"A. I would say more than that, and he was talking right along. In fact, there was another

(Testimony of Joseph L. Scardino.)

bookkeeper before that. I was in bad condition on the payments and he used to go to the general contractor and tell him, 'Don't make any more checks. Whenever you make the check, to make it jointly.'

"Q. Do you know whether such checks were made to H. E. Casey Company and yourself jointly?

"A. Yes, they wanted those checks like that and we had to make them like that, seeing this was referring to the general contractor.

"Mr. Margolis: Do you know where the original of this is?

"Mr. Mullin: I don't think the original was ever signed, so far as I know.

"Mr. Margolis: Q. Where are your books and records, Mr. Scardino?

"A. My books and records I move from Menlo Park and part I left and another part I put some place in Redwood City. I put it in a separate room like a garage, but there was a key on when I put it, but the owner forgot and left it open. He had a dog that went in there in that [67] room and destroyed everything, chewed everything up, and that is what happened to all my records.

"Q. Did you get any of the moneys set out alongside the jobs in that letter?

"A. I did not get any more money since I quit the business. I did not collect a cent.

"Q. You did not collect a cent?

"A. No, sir.

"Q. I show you this letter, on the stationery of Conway and Culligan, and ask you if that is your signature?

(Testimony of Joseph L. Scardino.)

"A. That is mine, yes.

"Q. Do you know whose this is?

"A. That is Tom Conway.

"Q. Do you know whose this was?

"A. That is Mr. Casey's bookkeeper.

"Q. Mr. Mendich? A. Yes.

"Mr. Margolis: I will offer it in evidence.

"The Referee: Trustee's Exhibit No. 1.

"Mr. Margolis: Q. Did you ever speak with Mr. Ferris of the San Mateo Feed & Fuel Company?

"A. Yes.

"Q. Within thirty, sixty or ninety days prior to the filing of this petition in bankruptcy here, in connection with the account?

A. I spoke to Mr. Ferris, Jack Ferris, which he was the salesman and collector at the same time.

"Mr. Mullin: That is not Mr. Ferris.

"Mr. Margolis: Q. Of the San Mateo Feed & Fuel Company. You know Mr. Ferris?

"A. I know him personally. I did not talk to him. He had a bookkeeper took charge of all the collecting.

"Q. Do you know the bookkeeper's name?

"A. He changed it a couple of times there, two or three times he changed. I don't recall.

"Q. Who was the bookkeeper you saw?

"A. He had one manager years ago and changed to another. I could not recall his name. [68]

"Q. Now, can you tell us where you signed this

(Testimony of Joseph L. Scardino.)

letter I just showed you, Trustee's Exhibit No. 1? Where was it?

"A. Conway and Culligan's office in Burlingame Village.

"Q. Who was there at the time you signed it?

"A. At the time I was there, Tom Culligan, and I think Mr. Conway was there, that other party; I was there, Mr. Mendich was there. If I recall, I think Mr. Casey was there, but I don't know if he stayed there until the end or left. I don't recall.

"Q. Was anybody else there?

"A. There was the bookkeeper.

"Q. Anyone from the San Mateo Feed & Fuel Company there? A. No.

"Q. Did you have any member of the firm of the San Mateo Feed & Fuel Company, or the bookkeeper, call on you about this time in connection with the obligation due the San Mateo Feed & Fuel?

"A. The bookkeeper comes and brings those assignments and makes me sign to give him full authority to collect the money that is coming. I think that is what I signed; that is these I signed, every one of those are individual.

"Q. Each and every one has your signature?

"A. Yes.

"Q. Dated February 17, 1942?

"A. That is right. Those are my signatures, yes, sir.

"Q. Now, can you tell he Court where these

(Testimony of Joseph L. Scardino.)

were signed, were you in a house, an office, where, if you recall?

"A. I think, I cannot recall, we were down on 39th Avenue on this job, right on the street, or either in his car.

"Q. Whose car?

"A. The fellow who was collecting.

"Mr. Hoffman: What is his name?

"Mr. Mullin: Jack De Monte.

"Mr. Margolis: Q. Does that refresh your memory? Do [69] you remember Jack DeMonte?

"A. I say I know the man when I see him. I told you I don't know the name unless you tell me now.

"Q. Does that name refresh your memory?

"A. That is right.

"Q. You had seen him before that time?

"A. Every other day he used to come around on the jobs.

"Q. What conversation did you have with him?

"A. He came down, he was in charge to collect money for the San Mateo Feed & Fuel, and said unless I pay some money he will lose his job. I say: 'I haven't got no money. When I collect, I will give it to you.'

"Q. Did you discuss your financial condition with him generally?

"A. I did. I told him I am broke, I got no money in the bank or anyplace else.

"Mr. Margolis: You may cross-examine. Just a minute.

(Testimony of Joseph L. Scardino.)

"Q. Did you receive any moneys from those assignments? A. No, sir.

"Mr. Margolis: I offer these in evidence, if the Court please, and ask that they be appropriately marked as the next in order.

"The Referee: Trustee's Exhibit No. 2.

"Cross Examination

"Mr. Mullin: Q. Mr. Scardino, do you ever remember signing the original of this assignment, dated February 18, 1943?

"A. This one here?

"Q. Do you know whether or not you ever signed it?

"A. This here, I told you before, that this here I don't recall exactly if I did sign or not.

"Q. You are not sure? A. No.

"Q. But you recall signing these?

"A. That I signed, this and another one.

"Q. You had been doing business with H. E. Casey Company a number of years, had you not?

"A. Since 1927, I think. [70]

"Q. Or earlier?

"A. Now, I don't recall the month it was, either June or July.

"Q. Well, it was quite common, was it not, for the credit managers, both of the San Mateo Feed & Fuel Company and H. E. Casey Company, to come and call on you for payments over a period of years?

"A. Not as early as I started business. After about a year or so, they used to come often.

(Testimony of Joseph L. Scardino.)

"Q. From 1938 on?

"A. Just about '38, and as a matter of fact, as I say before, I complained at that time that they should not do that. They went to the general contractor and tell them don't make the check on my name alone, make a joint check whenever payments are coming, either the first or second account.

"Q. It was quite common for you in your business, from 1938 on at least, to have checks from the general contractor to you as subcontractor, to be made payable jointly to you and the material house who supplied you sand, plaster, or the materials used?

"A. I did not sign anything. They got it without my authority. They tell the general contractor whenever they make a check to Scardino, don't make it to his name alone.

"Q. You knew that at the time?

"A. I knew it was done. I went to Mr. Casey and complained about it. I went to the bookkeeper and all. Mr. Casey knew that, too. I went in the office.

"Q. You continued buying merchandise?

"A. Yes.

"Q. And it was also quite common with you to get assignments, authorized assignments, from the general contractor to make payments to your material men, was it not?

"Mr. Margolis: Objected to on the ground that it is argumentative. It is not material whether or not he gave assignments heretofore.

(Testimony of Joseph L. Scardino.)

"Mr. Mullin: If the Court please, I propose to show [71] an established custom and practice with this bankrupt in his business over a period of years.

"The Referee: Why would that make a difference, if it was done within four months and violated the Bankruptcy Act?

"Mr. Mullin: Your Honor, my understanding of the Bankruptcy Act may not be correct, but my understanding is, that any assignment that has been taken in good faith for adequate consideration is a good assignment, although made within four months.

"The Referee: Well, you can show that each one you have here was for adequate consideration, but the fact that it went on over a number of years would not mean that one might be absolutely valid and the next one not.

"Mr. Mullin: Unfortunately, Your Honor, in presenting proof you cannot offer it all at once. But I ask to establish a custom with this man.

"The Referee: In face of the objection, that is not good.

"Mr. Mullin: For the purpose of the record in the matter, I would like the record to show that H. E. Casey Company makes an offer to prove, to show that the practice of assignments had been common with the bankrupt and with others during all the period of years prior to the filing of this bankruptcy.

"The Referee: That may go in the record.

(Testimony of Joseph L. Scardino.)

"Mr. Mullin: Q. Do you recall where this assignment of February 20th was signed?

"The Witness: A. I cannot remember the date, but I know I signed it.

"Q. Do you know where you signed it?

"A. In Conway and Culligan's office in Burlingame Village.

"Q. Do you recall whether or not Mr. Casey was present?

"A. As I told you, I recall he was present, but I cannot remember whether he was there at the last. I know the bookkeeper was there, but I could not say whether he was there at the end or not. [72]

"Q. You were indebted to H. E. Casey Company at the time you signed that? You owed them money?

"A. Not to Conway and Culligan, to Mr. Casey.

"Q. I say, at the time you signed the assignment, you owed H. E. Casey Company some funds, you owed them money, did you?

"A. On material that went on Conway and Culligan's and other jobs.

"Q. You still owe them a balance, do you?

"A. I don't know if I owe a balance or not, because I gave full authority to collect these moneys I have coming.

"Q. In your schedules in bankruptcy did you list H. E. Casey Company as a creditor?

"A. I don't think so.

"Q. And they are not included?

"A. The reason why, I think they had full

(Testimony of Joseph L. Scardino.)

authority to collect the money. If I did not have plenty, they could get a lien on those jobs, each individual, for the material. Suppose I collect the money and run away? They are not going to lose the material. They are going to lien those jobs and get it.

"Q. In fact, at the time you signed the assignment, their lien period time was running short, wasn't it? A. No, sir.

"Q. On some jobs?

"A. On some jobs, probably, yes, ten days. On other jobs they had sixty or ninety days.

"Q. But some were within a ten-day period?

"A. Maybe one or two jobs, maybe not.

"Q. You stopped operating as a plaster contractor shortly afterward, did you not?

"A. I stopped before that, maybe a week before.

"Q. In fact, you did not finish these jobs yourself; someone else had to finish them?

"A. No.

"Mr. Mullin: That is all.

"Mr. Hoffman: Q. The assignment here, Mr. Scardino, dated February 20th, addressed to Conway and Culligan, as [73] I understand, was signed at the office of Conway and Culligan in the presence of Mr. Casey's credit manager, possibly Mr. Casey, and Conway and Culligan. No one from the San Mateo Feed & Fuel Company was there, were they?

"A. Not that day.

(Testimony of Joseph L. Scardino.)

"Q. You have shown no balance due to the San Mateo Feed & Fuel Company. Didn't you know how much was due H. E. Casey Company and the San Mateo Feed & Fuel Company? Didn't you know how much you owed them? A. Yes.

"Q. On these three last cases?

"A. The San Mateo Feed & Fuel and Casey.

"Q. They were not listed?

"A. No, because I told you there was enough money. Even if there was not, they could get the money

"Q. You received statements from time to time from them? A. Yes.

"Q. These assignments here, all dated February 17th, do you know whether or not the San Mateo Feed & Fuel Company ever received payment on account of those assignments?

"A. I don't know.

"Q. You don't? A. I don't know.

"Mr. Hoffman: No further questions.

"Mr. Mullin: Just one further question.

"Q. Mr. Scardino, you also received statements from H. E. Casey Company, did you not?

"A. Yes.

"Q. Monthly bills?

"A. Yes, but they was all destroyed and I have not got any.

"Redirect Examination

"Mr. Margolis: Q. In answer to a question of Mr. Mullin, he asked you about the jobs all being uncompleted when you quit your business?

(Testimony of Joseph L. Scardino.)

"A. No, maybe there was three or four jobs not completed. The rest of them were all completed. [74]

"Q. The rest of them were all completed?

"A. Absolutely. There just was maybe $100 or $150 labor and very little material to go on perhaps, and I had about forty jobs going on all told. That was all I left, four jobs without completing.

"Q. Now, you also testified that the date that assignment was signed, that letter on Conway and Culligan's stationery, that no one from the San Mateo Feed & Fuel Company was there that day?

"A. No.

"Q. Did you mean to say that you saw and spoke to them in connection with that at any other time?

"A. The San Mateo Feed & Fuel?

"Q. Yes.

"A. Yes, the bookkeeper, I think, came down before I signed this.

"Mr. Pardini: Indicating the yellow sheet.

"The Witness: A. Before I signed this, the San Mateo Feed & Fuel came down and found me on the jobs and I signed those assignments for them.

"Mr. Margolis: Q. You have reference to Trustee's Exhibit No. 1, the letter, you are pointing to?

"A. That is right.

"Q. Did you see the bookkeeper or anyone from the San Mateo Feed & Fuel Company after the date of that assignment? A. No.

"Mr. Margolis: That is all.

"(Witness excused.)

"Mr. Margolis: We will call Mr. Casey.

"HAROLD E. CASEY,

called for the Trustee; Sworn.

"Mr. Margolis: Q. Mr. Casey, you will recall at the last hearing in this matter, we talked about this assignment, dated February 18, 1942?

"A. I do.

"Q. Do you remember my asking you whether you had the [75] original of that assignment?

"A. Yes.

"Q. Did you find it?

"A. No, I did not find it. It is the only one I have.

"Q. Did you ever see the original of that?

"A. I don't think I ever did.

"Q. Don't you recall testifying that the original of that was signed and left with Conway and Culligan, to whom it was addressed?

"A. I don't think I said it has been. I said I assumed it had.

"Q. You had not seen it? A. No.

"Q. Can you tell us from your records how much money and when you received the money in connection with Job No. 1172, which is the first job number on the letter which you have in your hand?

"The Witness: Have you the ledger sheet?

"Mr. Mullin: Yes.

"The Witness: A. The amount of $28.64.

"Mr. Margolis: Q. Did you receive $28.64?

"A. Yes, it looks like February 28.

"Q. You received $28.64 on February 28?

"A. Yes.

(Testimony of Harold E. Casey.)

"Q. That was to cover Job. No. 1172. Is that correct? A. According to this.

"Q. Your records show you received that money. is that correct? A. Correct.

"Q. On February 28, 1942, $28.64. Is that right? A. That is right.

"Q. On Job 1142, can you tell us how much money you received, and when?

"A. There is shown in here a couple of items which it might have been in on. One here is February 24, $478.09.

"Q. February 24? A. Yes.

"Q. 1942? A. That is right.

"Q. Four hundred what?

"A. $478.09. What that [76] couples up, I don't know.

"Q. You have made some pencil notations on the carbon copy of the letter dated February 18. Can you tell us whether this $478.69 applies to any of these job numbers on the assignment?

"A. I say they do, yes.

"Q. Can you tell which ones?

"A. That is what I say. I cannot tell offhand, but they are an accumulation of these figures.

"Q. And that you received February 24, 1942?

"A. Right.

"Mr. Mullin: The amount of $400. was received. That did not necessarily include $67.40. It might or might not.

"Mr. Margolis: Q. Can you tell us whether $67.40 is included in the amount of $478?

(Testimony of Harold E. Casey.)

"A. Not from what I have here, no.

"Q. How can we ascertain that information?

"A. I don't know whether I could ascertain it or not.

"Q. Would you say you never received the $67.40? A. No, I would not.

"Q. Would you say you did receive it?

"A. I would say we did.

"Q. All right. We will pass that for the moment. And, directing your attention to Job No. 1149, can you tell us, pursuant to the asignment of February 18, 1942, how much you received and when you received it?

"A. No, because we then go to a couple of items: $286 and $313.

"Q. $286 even? A. Yes.

"Q. And what date did you receive the $286?

"A. March 14th.

"Q. 1942? A. Yes.

"Q. And can you tell from the record whether the amount of $204.97 is included?

"A. Yes, it is included.

"Q. It is included?

"A. It would have been [77] included in that, yes.

"Q. Directing your attention to Job No. 1112, can you tell how much you received and when you received the money?

"A. Well, that may have been in the same amount. The last was $204.97?

"Q. That is correct.

(Testimony of Harold E. Casey.)

"A. Now you want $219.12?

"Q. That is correct.

"A. Well, there is another item here of $313.08 that probably would cover that.

"Q. You received that on what date?

"A. The $313 was March 14th.

"Q. The same day you received the $286 even, you received $313.08? A. Correct.

"Q. And this money we have just referred to all came from Conway and Culligan pursuant to this assignment of February 18th. Is that correct?

"A. Yes.

"Mr. Mullin: I move to strike the answer and object to the question on the ground that there has been no showing there was an assignment as of February 18, 1942.

"The Referee: Would there have to be under the allegations of his petition?

"Mr. Margolis: I don't think so.

"The Referee: Whether there was an assignment or not, under certain conditions, would it make any difference?

"Mr. Mullin: Well, he is asking about an assignment, Your Honor. It has not been established that there was an assignment.

"The Referee: What does his petition say?

"Mr. Margolis: I think this letter, if I may interrupt, would answer that.

"The Referee: Just a minute, counsel. Which assignment are you under now?

"Mr. Margolis: I am under the assignment that

(Testimony of Harold E. Casey.)

was executed by Mr. Scardino. This may purport to be a letter. [78] I will refer to it as the purported assignment, if that will satisfy you.

"Mr. Mullin: It is not a question of satisfying me, counsel; it is merely what is proper and what is not proper.

"Mr. Margolis: I will have the record read back. It was my understanding when this matter was first heard, I may be in error, that the original was in existence and was signed by the parties.

"The Referee: Let's get the date of the hearing.

"Mr. Pardini: January 26th, right at the beginning of the testimony of Mr. Casey.

"The Referee: Mr. Blair, will you get the record of January 26th and let's find where we are.

> "The Reporter then read from the notes of the hearing in the above-entitled matter of January 26th, 1942, from the testimony of Harold E. Casey, who was called as a witness on behalf of the trustee, as follows:)

"'Mr. Margolis: Q. Did you bring with you documents and papers in connection with any transactions had with Mr. Scardino?

"'A. I brought the ledger cards showing the dates requested, December.

"'May I see them, please?

"'A. That is the original.

"'Q. Did you bring with you any paper or document indicating an assignment of any kind from Mr. Scardino to the Casey Company?

"'A. We have one here.

(Testimony of Harold E. Casey.)

"'Q. May I see it? Where is the original of this, do you know, Mr. Casey? A. That is it.

"'Q. I mean the one bearing Mr. Scardino's signature?

"'A. I don't know. That is all that is in the file. This was honored and paid.

"'Q. May I withdraw it from that file?

"'A. Yes.

"'Mr. Margolis: I will read this into the record, Your Honor: (Reading) [79]

"'Mr. Pardini: That is not signed, this particular document.

"'Mr. Margolis: This particular document is a copy. The date is February 18, 1942.

"'Q. Can you enlighten us on this document in any respect, Mr. Casey?

"'A. Well, Conway and Culligan would have the original.

"'Q. Now, did you get other or additional assignments except this?

"'A. There is one of these. I have a couple of those. Whether or not that is an assignment, I don't know.

"'Q. Do your records indicate, Mr. Casey, that the sum total of $2,035.89 was collected pursuant to the assignment I have just read into the record?

"'A. I think, if I remember correctly, that was subject to an adjustment. What is the amount?

"'Q. $2,035.89?

"'A. Well, I know it was paid through Conway and Culligan and credited to his account.

(Testimony of Harold E. Casey.)

"'Q. Did you set up a separate account for the assignment? A. Yes.'

"Mr. Margolis: Supplementing that testimony, Your Honor, with the language in the answer of the respondent here, as follows:

"'Said bankrupt did make certain assignments to respondent herein for certain monies, which were due said bankrupt from Conway and Culligan, building contractors, and further alleges that said assignments were made in the ordinary course of business as conducted by this answering respondent and others dealing in the same type of business as respondent in the community in which respondent operates his said business; denies that respondent holds any money received pursuant to [80] any assignment, save and except the sum of Two Thousand Thirty-five and 89/100 ($2,035.89) Dollars; denies that the monies received by respondent from said bankrupt are held by respondent without color of right or title thereto, and in this respect alleges that said sums received by respondent by virtue of said assignments were received in the ordinary course of business of respondent.'

and so forth and so forth. This is verified.

"Mr. Mullin: That is perfectly correct.

"Mr. Margolis: It is the answer of the witneses on the stand.

"Mr. Mullin: That is perfectly correct. My objection is, you are questioning him under a purported assignment of February 18, 1942, which so

(Testimony of Harold E. Casey.)

far as I know, there has been no proof offered that the same was ever executed. My objection was to the so-called assignment unless in fact it was an assignment. I have produced an assignment of February 20th, and that, so far as I know, was the only assignment ever executed.

"The Referee: You can interrogate Mr. Casey on his answer made on the other hearing if you want.

"Mr. Margolis: Q. You heard the testimony read to you just now, Mr. Casey?

"The Witness: A. Yes.

"Q. Was that testimony correct? Did you say the original of the document you hold in your hand was in the possession of Conway and Culligan?

"A. So far as this particular document, I happened to find it in the file. Our bookkeeper made these items up for these different jobs of Conway and Culligan. Whether anything was ever signed on it, it was with no knowledge of mine.

"Q. You heard the testimony read, where you were asked what happened to the original and you said it was in the hands [81] of Conway and Culligan?

"A. When I came up that day, that was the first time I knew a bankruptcy was going on. This piece of paper was in the file and I assumed there was an original. I have checked with Conway and Culligan and they have no original of this.

"Q. You are positive of this?

"A. They have that assignment there.

(Testimony of Harold E. Casey.)

"Q. When did you last check with them?

"A. Within a week.

"Q. Then the testimony you gave here on the hearing in January is not absolutely correct?

"A. Well, from the evidence produced since, I would say it is incorrect.

"Q. Now, to what does that letter refer, this yellow letter, do you know?

"A. Well, that letter would refer to this total amount. How it was paid and what it came in on would be two different things.

"Q. It does, in fact, refer to——

"A. $2,035.89.

"Q. It does, in fact, refer to the items of the carbon copy of February 18th, does it not?

"A. That would make up our ledger sheet, yes.

"Q. Where did the information come from that went into that letter of February 18, 1942?

"A. You mean this here?

"Q. Yes. A. Our file.

"Q. And that was done in your office, was it not?

"A. This here?

"Q. Yes. A. I could not tell you.

"Q. Do you know where it was done?

"A. No.

"Q. Do you know who prepared it?

"A. Well, it could have been prepared by us or by Conway and Culligan.

"Q. The information is accurate, is it not?

"A. Well, here is the thing: Conway and Culligan kept everything by job, what was paid on them,

(Testimony of Harold E. Casey.)

by job. Whether [82] these particular amounts of jobs were taken and checked against our total, I don't know.

"Q. You don't know?

"A. All we are interested in is the total.

"Q. Can you tell us whether that letter on the Conway and Culligan stationery referred to the document you have in your hand?

"A. It refers to the total here, $2,035.89.

"Mr. Margolis: I think that establishes it sufficiently, Your Honor.

"The Referee: It may not establish the assignment, but it shows the amount that went there. Now, if the amount went there and the man was insolvent, and they knew he was insolvent, or had reason to believe he was insolvent, within four months——

"The Witness: Why would I?

"The Referee: I am talking to counsel at the present time. What is the answer to that, Judge Mullin?

"Mr. Mullin: My answer, may it please the Court, is that we received the sum of $2,035.89, as set up by the answer; that the sums were received from Conway and Culligan by virtue of an assignment. It was the common practice between Mr. Casey, Scardino and other subcontractors.

"The Referee: What difference would the common practice make?

"Mr. Mullin: Just a moment, please. It would establish their custom.

(Testimony of Harold E. Casey.)

"The Referee: Custom cannot affect creditors.

"Mr. Mullin: As far as offering proof of the fact that we had no knowledge of the fact that Scardino was contemplating bankruptcy.

"The Referee: I am not deciding this case, but we have testimony that he was. He does not have to say that he is contemplating bankruptcy. All he has to say is: 'I have no [83] money or no property with which to pay.' Then that is either knowledge to you, or at least sufficient knowledge to give you reasonable cause to believe he is insolvent. That is why I am saying custom does not enter into it.

"Mr. Mullin: I would say that custom would enter into it by virtue of the fact that over a period of years the same type of dealings had been going on between H. E. Casey & Company and Scardino, and that checks drawn jointly to Scardino and H. E. Casey & Company by general contractors had been used. They had been honored and Scardino had remained in business and his financial condition, so far as bankruptcy was concerned, was no different so far as the knowledge of H. E. Casey & Company is concerned, on February 20th than it had been for a number of years previously.

"The Referee: I will ask you this: Suppose over a period of years, every time the bankrupt got behind, they went down and did not get an assignment, but just got money from him. Under those circumstances, would you say that custom entered into it if the last payment was within four months of bankruptcy?

(Testimony of Harold E. Casey.)

"Mr. Mullin: No, but the main objection, according to the petition here, is just that, and that alone, and the answer, that we are not bound unless we went out with knowledge of the contemplated bankruptcy of the bankrupt and, so to speak, forced him to give us an assignment. That is what I am here prepared to show.

"The Referee: Well, if it develops at the end of the hearing, if there is testimony in which he said to you: 'I am broke; I haven't money to pay you,' would it make any particular difference whether it was the custom or not? That is the reason I say your custom idea is not competent.

"Mr. Mullin: Except for the fact, and I think it will be developed, that it was quite common for Scardino at all [84] times to say he was broke.

"The Referee: If he did that, it put you on notice. If you admit that, it puts you on notice.

"Mr. Mullin: But, the bills always were paid.

"The Referee: But a time did come when the bills were not paid by Scardino.

"Mr. Mullin: Yes, many people, and I think Your Honor undoubtedly has had similar matters, where a person, any time you go to collect and don't get it, says, 'I am broke; this, that, or the other thing.' In fact, unless we had actual knowledge of the fact that the man in fact was broke, I don't believe we are bound.

"The Referee: The law does not say so. It says if you have reasonable grounds to believe it. If a man says: 'I am broke,' that puts you on notice.

(Testimony of Harold E. Casey.)

"Mr. Mullin: Let's stand on the reasonable grounds. If, over a period of years, the same thing had transpired, as I am prepared to prove, and the same type of discussion, 'I am broke,' over a period of years, but in fact the man was not broke and in fact continued to operate and was successful in his operations, would that one statement, in view of the many other statements by this man, amount to reasonable knowledge?

"The Referee: Absolutely. If you were constantly dealing with a man who said, 'I am broke,' and you finally got your money and the day came when he was broke, you are bound.

"Mr. Mullin: Your Honor may be correct, but I respectfully state that I cannot subscribe to that.

"The Referee: Of course, that is the reason we have litigation.

"Mr. Mullin: That is right.

"Mr. Margolis: Q. Can you tell us, Mr. Casey, with respect to Job No. 1139, how much you received and when? [85]

"Mr. Mullin: There is an objection pending.

"The Referee: The objection may be overruled.

"Mr. Margolis: Then I will repeat my question.

"Q. Can you tell us from your records, Mr. Casey, with respect to Job No. 1139?

"The Witness: A. $31.21?

"Q. Yes, $31.21.

"A. I cannot tell from this record. As I said before, this money came in in much larger amounts

(Testimony of Harold E. Casey.)

than shown here and were all accumulated into a total.

"Q. In order to conserve time, will you say that all these that I am referring to, the jobs listed on the document dated February 18, 1942, which you have in your hand, addressed to Conway and Culligan, would you say you received the amounts listed alongside the job numbers?

"A. That is right.

"Q. May I see your copy a moment? And, can you tell us what the total was? A. $2,035.89.

"Q. In whose handwriting are these figures?

"A. I don't know. I was trying to make them out myself.

"Q. This was in your file?

"A. It could be Jules Mendich.

"Q. Do you recognize this handwriting?

"A. No, I don't.

"The Referee: Q. Who was that you said?

"The Witness: A. Jules Mendich.

"Mr. Margolis: Q. He was your bookkeeper?

"A. No, credit manager.

"The Referee: Q. Do you know where he is?

"A. He is in the shipyards.

"Mr. Margolis: Q. Do you know which one, Mr. Casey?

"A. I think Western Pipe.

"Q. Do you know who changed the figure that appears to be changed from some amount to $2,035.89? A. No, I don't.

"Q. Do you know who determined that?

"A. No, I don't. [86]

(Testimony of Harold E. Casey.)

"Q. How can you tell there was received, pursuant to this figure in the document dated February 18, the sum of $2,035.89?

"A. Because I checked the bills that constituted these numbers, the job numbers, against the bills.

"Mr. Pardini: Q. The job numbers?

"A. Yes.

"Mr. Margolis: Yes.

"The Witness: A. Against our invoices and totalled them up and got this total.

"Q. Where are those bills? Have you got them here?

"A. No, they are in our files, Mr. Margolis.

"Q. You say they are in your files?

"A. Yes.

"Q. When did you last see them?

"A. Well, I would say it was the day we were in Court.

"The Referee: The 26th of January.

"Mr. Margolis: Q. You received this trustee's petition for a turnover order?

"A. No, the original time——

"Q. I am asking another question. You received this? A. This last one?

"Q. This document entitled Trustee's Petition for a Turnover Order? A. Yes.

"Q. You received a copy of this and the order to show cause? A. Yes.

"Q. Did you read it? A. I did.

"Q. Did you read that portion which reads as follows? I am reading from page 2 of the Order:

(Testimony of Harold E. Casey.)

"'It is further ordered, that said respondents bring with them all of their books, records, and documents covering the moneys received by them under and by virtue of the assignments referred to in said Trustee's Verified Petition, including all of the information regarding the notices of completion in connection with the receipt of said moneys under and by virtue of said [87] assignments.'

"A. Well, I have brought that.

"Q. Are the bills still available?

"A. Yes, they are.

"Q. That give the figure of $2,035.89?

"A. They give a figure of $1,920.26, less a credit, if I remember correctly.

"Q. What happened to the credit?

"A. The credit was given to the account.

"Q. Did you see those payments as they came through, those you already testified to: $28.64 on February 28, $478.09 on February 24th, the $286 on March 14th, and again on March 14th the $313.08?

"A. Are you asking, did I see them?

"Q. Yes, did you see the checks as they same through?

"A. I may have and I may not. That is a long ways back. They may have been put in the bank without my seeing them.

"Q. Do you know whether you say any of those checks covering the items?

"A. Yes, because some of them came in the mail, which I may have opened. Some may have been collected from the office.

(Testimony of Harold E. Casey.)

"Q. Of Conway and Culligan? A. Yes.

"Q. Did you go by to collect any of them or did you send someone from your office? A. No.

"Q. Have you a recollection of seeing one or more of the checks representing those items?

"A. Yes.

"Q. And who was the payee on them?

"A. Ourselves.

"Q. Scardino's name was not included in it?

"A. No, it was not.

"Q. You did not need the endorsement of Scardino, that you know of? A. No.

"Q. Directing your attention again to the list on the letter dated February 18, 1942, can you tell by looking at that and comparing it with your ledger card that you have, [88] when the first payment was received in connection with these items on the letter of February 18th? When was the first payment received? A. February 24th.

"Q. That was the $478.69? A. .09

"Q. On February 24, 1942? A. Yes.

"Q. And when was the last item received covering the job numbers and the amounts on this letter of February 18, 1942? A. April 27th.

"Q. Of what year? A. 1942.

"Q. In what amount? A. $106.60.

"Q. Now, you received some money in January, did you not, directly from one Schmidt?

"A. Well, I could not tell from here.

"Q. Do you remember having those blue slips with you at the last hearing on January 26th?

(Testimony of Harold E. Casey.)

"A. Yes.

"Q. Where are those slips?

"Mr. Mullin: I have them here.

"Mr. Margolis: Q. I show you these two documents and ask you what they are, if you know?

"A. These are orders from Schmidt for the American Trust Company to pay us the amount of $81.43 and $81.43.

"Q. Under what date? A. January 15th.

"Q. Did you receive both of those amounts?

"A. No, these are still outstanding.

"Q. Now, do your records reveal a payment of $252.35 on January 20, 1942?

"A. What amount?

"Q. $252.35? A. In January?

"Q. Yes, January 20th?

"A. $252.37, that is right.

"Q. $252.35 is the amount I have.

"A. It is 37 here.

"Q. Now, was that by virtue of one of these assignments similar to the documents I just showed you? A. It could have been. [89]

"Q. I believe you had some others at the time?

"A. Have you the others?

"Mr. Mullin: Not that I have seen.

"The Witness: A. They would have been collected, that is right. It could have been.

"Mr. Margolis: Q. $252.37, that was on what job?

"A. Well, it must have been on the Schmidt job.

"Mr. Mullin: If you know what job, Mr. Casey.

(Testimony of Harold E. Casey.)

"A. I am only assuming.

"Mr. Margolis: I will ask the Court to check back the record. I have some definite notes here wherein he testified, that on January 20, 1942, he received the additional sum of $252.35, and another sum of $246.50, and I have a very distinct and definite note here.

"The Referee: Very well.

"Mr. Margolis: It appears to me to be on the Schmidt job. The reason I am asking that we go back to the record, Your Honor, is my recollection of these facts is that those two items were in addition to the $2,035.89 already testified to under the document the witness has in his hand.

"The Witness: Aren't you referring to an amount of $262.66?

"Mr. Margolis: No. Let me refresh your memory, if I may, Mr. Casey.

"Q. I believe you testified that under the Schmidt job, on January 15, 1942, you received an assignment, which you had there, the blue document, for $81.43 and another of the same date in the same amount, making a total of $162.86. Your testimony in January was that this amount is still open and uncollected? A. That is right.

"Mr. Mullin: He also testified he received $252.35.

"Mr. Margolis: $252.37, which I have marked paid.

"Q. Your testimony being that it was paid to

(Testimony of Harold E. Casey.)

you on January 20, 1940. You also said the sum of $256.50 was [90] already paid, meaning you had received it, that the amount was paid. Does that refresh your memory?

"A. I believe where I got that was out of a Schmidt letter in the file.

"Mr. Mullin: It may be. Here is your whole file, Mr. Casey.

"The Witness: $252.35?

"Mr. Margolis: Q. That is the figure I asked you for.

"A. That is right. That was under the assignment on that date.

"Q. Not on this one of February 18, 1942? That was in addition to this?

"A. That is right, a blue assignment.

"Mr. Margolis: May we offer these in evidence, Your Honor, so we can refer to them properly?

"The Referee: Trustee's Exhibit No. 3, two of them, both dated January 15, 1942; one is for $81.43 and one is for $81.43.

"Mr. Margolis: Q. Then you did receive on the Schmidt job $252.35 on January 20, 1942. Is that correct?

"A. Well, there is a discrepancy here of two cents. Whether that is it or not, I have $252.35 and it shows received $252.37. Whether it is the same thing, I don't know.

"Q. What is your best recollection of it? Where did you get the $252.35 from?

(Testimony of Harold E. Casey.)

"A. Every notation is on a list of jobs covered by these assignments.

"Q. And the $252.37, you got from where?

"A. From the job payments.

"Q. Well, do you think it was the same item?

"A. Well, there is a two-cent difference. It could be.

"Q. In all events, you received that money on January 20, 1942, in accordance with the record you have in your hand?

"A. I received $252.37. [91]

"Q. Fine. Now, does your record reveal an item of $246.50 paid to you on the Schmidt job?

"A. There is no item for that specific amount.

"Mr. Margolis: May we have a five-minute recess? I think we can conclude in another five or ten minutes.

"The Referee: She has the record right there. She can check it.

"(The reporter then read from the record of January 26, 1942, at page 171 and page 172 of notes, as follows:

> "'Mr. Margolis: Q. How many of these documents labelled American Trust Company not negotiable, did you receive from Mr. Scardino?
>
> "'A. The total is there, isn't it?
>
> "'Q. Will you find it for me? I cannot see a total on this.

(Testimony of Harold E. Casey.)

"'A. Maybe it is not. You had a total of $162.86, did you not?

"'Q. The sum total of these two items here?

"'A. All right. There is another total of $252.35 and $246.50. Those together would make $661.71. Is that correct?

"'Q. That is correct.

"'A. Then, the $252.35 and the $246.50 are the ones paid, leaving $162.86 still open.'

"Mr. Margolis: Q. Then, there was $246.50 paid H. E. Casey Company pursuant to one of these blue assignments?

"A. I don't think we have them in an item of $246.50.

"Q. You do find an item of $246.50?

"A. Yes, on the list, but I don't have a $246 on the ledger received. Do you see what I mean? Listed on this piece of paper.

"Q. May I see the paper?

"A. See what I mean?

"Q. Yes, I see what you mean, but I believe you had another blue one.

"A. This is all we have left.

"Mr. Pardini: They pick these up when they pay.

"Mr. Margolis: Q. Does your record show you received [92] that amount of $246.50?

"A. I could not tell from here.

"The Referee: Didn't you so testify the other day when you were here?

(Testimony of Harold E. Casey.)

"A. I might have testified we had an item of $246.50.

"Mr. Pardini: Included in the general collections after January, 1941.

"The Witness: A. Of $661.71.

"Mr. Pardini: Q. And among that money was $246.50 on January 20, 1942?

"A. I have a payment here of Schmidt, $262.66.

"The Referee: That is another payment, is it? What date?

"A. February.

"Mr. Pardini: Q. What date?

"A. February 19th.

"The Referee: You did not mention that the other day, did you?

"A. We argued over that, as I remember, trying to establish that figure. That is the way it was. You are talking of $246 and I was talking about $252.35.

"The Referee: You heard what the reporter read to you. That was your testimony, wasn't it?

"A. It may have been on that day.

"The Referee: You are endeavoring to tell the truth at all times, aren't you?

"A. That is right. But we were going around in a circle here trying to find a lot of items.

"Mr. Margolis: We are not going in circles.

"The Witness: A. I say we were that day.

"Mr. Margolis: Q. I will ask you this: Now, you received some money in October of 1942, also, didn't you?

(Testimony of Harold E. Casey.)

"A. October?

"Q. Yes, sir? A. Yes.

"Q. $158.39?

"A. That was through a lien. [93]

"Q. When was the lien filed, do you know? Do your records show?

"A. Not what I have here. It was filed through a fellow by the name of Burns.

"Q. Do you know when it was filed?

"A. No, I don't.

"Q. Do the records reveal it?

"A. You can probably get it from Burns.

"Q. Would your records reveal, how much money, excluding this $158.39, Mr. Casey, you received from February 24, 1942, to date, excluding the $158.39? Can you give us the total?

"A. Let me have that again.

"Q. You testified that the first payment you received pursuant to this letter you have in your hand the assignment of February 20th, was a payment of $478.09 on February 24, 1942?

"A. Yes.

"Q. All right. Now, can you give us the sum total of all the moneys you received in these matters from that date until today, excluding the $158.39?

"A. Which one is the $158.39?

"Q. That is the one you just mentioned that you received in October. Exclude that.

"A. Well, I would have an item of $2,035.89.

"Q. Go ahead. I will do the figuring, you give me the items. Go ahead. Was there anything in

(Testimony of Harold E. Casey.)

addition to that?

"A. Yes, plus $158.39 in October.

"Q. Is the item of $252.37 that you testified you received on January 20th included in the sum total of $2,035.89? A. No.

"Q. In other words, you received $2,035.89 and also $252.37, which is a separate item. Is that correct? A. There is $252.37, yes.

"Q. And $246.50?

"A. Well, I cannot say as to this $246.50 now, because it does not show on here. [94]

"Mr. Margolis: We submit that the sum total of these items is $2,534.76. The testimony so shows it and we will not take more time of the Court on these matters. We are not going to take the time of the Court to re-establish the $246.50. I offer in evidence the testimony adduced heretofore.

"The Referee: That is before the Court.

"Mr. Margolis: Yes.

"Q. Can you get for us the information with reference to the $158.39, Mr. Casey, when the lien was filed? You got the money in October, 1942. Is that correct?

"A. It was paid that date, yes.

"Q. Paid to H. E. Casey Company?

---

* The testimony referred to by the attorney representing the trustee is found in the Reporter's Transcript of the 21a examination, filed in the office of the clerk of this court on September 30, 1943, in connection with a petition for review, with reference to which comment hereinafter will be made.

(Testimony of Harold E. Casey.)

"A. That is right.

"Q. From whom did you receive it?

"A. The title company.

"Q. Do you know in connection with what job?

"A. I believe it was the Younger job.

"Q. Stanley W. Younger? There is nothing in your file that would show when the lien was filed?

"A. No, there is not.

"Mr. Margolis: That is all, Your Honor.

"The Referee: Any cross-examination, gentlemen?

"Mr. Mullin: Can we take a recess, Your Honor?

"The Referee: Yes, for about five minutes.

"(Recess)

"Mr. Pardini: Q. Mr. Casey, were there any other contractors with whom you dealt at this time on behalf of Scardino in a similar way, other than Schmidt and Conway and Culligan?

"A. With any others?

"Q. Yes.

"A. I think that is all. You mean at [95] that particular time?

"Q. Say anytime in 1942?

"A. I would be guessing on that, in 1942.

"Q. Well, about this time? I haven't the names. I had a list.

"A. But there is only a few months' period there.

"Mr. Margolis: Q. Younger was one of them?

"A. Younger was prior to that.

"Mr. Mullin: Younger was one of the lien jobs.

(Testimony of Harold E. Casey.)

"Mr. Pardini: Q. The Younger was afterwards?

"The Witness: A. No, prior.

"Q. Oh, prior?

"A. Younger was prior, in 1941.

"Q. Can you tell me from the books you now have, when was the last transaction with Younger before October, 1942? That is, before you got that $158?

"A. I would say it was back in 1941.

"Q. Have you any record that will show that?

"A. Yes.

"Q. Here? A. No.

"Q. Now, did you have any dealings with Joe Bettencourt?

"A. Well, we sell Joe Bettencourt. Yes, we sell him ourselves.

"Q. But, you did not collect from him on any account of Scardino's? A. I don't think so.

"Q. Your record would show that, would it not?

"A. If we had sold him, yes.

"Q. Did you collect from Mr. Gus Johnson for the account of Scardino?

"A. That is still an outstanding account. Gus Johnson's is made up in the balance Scardino still owes us.

"Q. That is the general account. And have there been collections? A. No.

"Q. When was the last collection on there?

"A. In 1941.

"Q. Do you know when in 1941? A. No.

(Testimony of Harold E. Casey.)

"Q. Your record will show when the last collection was and the amount? A. Yes.

"Mr. Margolis: Q. Would the records show the amount? [96] A. Would they?

"Q. Yes, your records?

"A. They may. I told you the last time I was here, we have had quite a change in help. It is hard to tell what will show up.

"Q. Would it likewise show an assgnment from Donald Johnson or to Donald Johnson from you?

"A. I could not say.

"Mr. Pardni: Q. Did you have one in the name of John L. Steiner? Have you collected any moneys from John L. Steiner for the account of Scardino?

"A. No.

"Q. At no time?

"A. No, we never had any of John L. Steiner's.

"Mr. Pardini: That is all.

"Mr. Margolis: Nothing further.

"Cross Examination

"Mr. Mullin: Q. Mr. Casey, your firm has done business with Scardino over a period of years?

"A. Yes.

"Q. Approximately how long?

"A. Oh, four or five years. I guess it dates way back to a job back in the '20's. I think it was. Then he went away and came back again.

"Q. Did you have any knowledge—I will withdraw that. When did you first have knowledge of the fact that Scardino was in bankruptcy or contemplating bankruptcy?

(Testimony of Harold E. Casey.)

"A. I never knew he was in bankruptcy until I came up here at the last hearing.

"Q. And was that under the subpena——

"A. That was the first notice.

Q. Calling for your appearance on January 26 of 1943? A. That is right.

"Q. You were served with a subpena to come to the hearing at that time? A. That is right.

"Q. On receipt of the subpena by you, that was the first time you knew Scardino was in bankruptcy? A. Right.

"Mr. Margolis: I am going to object on the ground that it calls for the opinion and conclusion of the witness. [97]

"The Referee: It is a matter of fact, isn't it? I don't know what his answer will be, but it will be a matter of fact.

"Mr. Margolis: What difference would it make when he heard about it? The question is, whether he knew about it before or had reasonable knowledge.

"The Referee: That is not your objection.

"Mr. Mullin: The objection is on the ground that it calls for an opinion and conclusion.

"Mr. Margolis: I will amend the objection, on the ground that it is immaterial.

"The Referee: It may be sustained on that ground.

"Mr. Mullin: Q. Mr. Casey, did you ever know of the fact that Mr. Scardino contemplated bankruptcy?

(Testimony of Harold E. Casey.)

"Mr. Margolis: I object to that question, if it please Your Honor, on the same ground.

"Mr. Mullin: Your Honor, the allegations of the petition here and the objections seem all one-sided so far as Mr. Margolis is concerned. He is very interested in getting what he wants but objects strenuously to anything else.

"The Referee: That frequently happens.

"Mr. Mullin: But always within moderation. It so happens here that the petition alleges certain things; one of which is that certain assignments were taken with the knowledge that Scardino contemplated bankruptcy.

"The Referee: Does the petition so allege?

"Mr. Mullin: I believe it alleges that we knew at the time of the acceptance of the assignment, if I remember the content of the petition.

"Mr. Margolis: I do not allege that it was taken knowing he was contemplating bankruptcy. I will read it:

> " 'That at the time of the assignments hereinabove referred to, said respondents knew bankrupt was [98] insolvent and caused said bankrupt to make said assignments without any consideration therefor.'

"The Referee: The objection may be sustained. If that is the allegation of the petition, you have your proper question to ask the witness.

"Mr. Mullin: Q. At the time that this assignment was made, and on February 20th of 1942, did you know that Scardino was insolvent?

(Testimony of Harold E. Casey.)

"The Witness: A. I did not.

"Q. Was there anything that would lead you to believe at that time that Scardino was insolvent?

"A. I would say no. Did you say solvent or insolvent?

"Q. Insolvent. Did you cause Scardino to make these assignments without any consideration therefor? A. Did I cause him to?

"Q. Yes.

"A. The assignment was caused by Conway and Culligan on the threat from us of a lien on their jobs.

"Q. You yourself had nothing to do with Scardino? A. That is right.

"Q. As I understand, Scardino was doing the plastering work for Conway and Culligan?

"A. That is right.

"Q. And he left some uncompleted jobs?

"A. He did.

"Q. And another plasterer took over?

"A. That is right.

"Q. What is his name? A. C. B. Anderson.

"Q. And did C. B. Anderson come to you for materials? A. He did.

"Q. And will you tell us when you first knew Scardino had stopped working on the Conway and Culligan jobs?

"A. Well, some jobs were practically due for the lien period and Culligan always made payment of those bills. The understanding was they made

(Testimony of Harold E. Casey.)

payment to us when the payments were due, the bills for payment. We said, 'If we cannot get payment, we will lien the jobs.' They said, 'You cannot lien a job, because we cannot have a lien on Burlingame Village.' [99]

"Q. Burlingame Village was a subdivision operated by Conway and Culligan?

"A. That is right. So they went out and got this assignment from Joe Scardino to pay us our bills. The arrangement for payment was made through myself and Tom Culligan, or Conway and Culligan.

"Q. Had it been your practice previous to this time to take, on the Scardino jobs and others, either joint checks, an assignment, or orders on the general contractor or owner for materials furnished by you to Scardino?

"Mr. Margolis: We object——

"The Witness: A. That was the general practice.

"Mr. Margolis: I object to the quetion, Your Honor, on the ground that it is totally incompetent, irrelevant and immaterial.

"The Referee: The objection may be sustained.

"Mr. Mullin: For the purpose of the record, I make an offer of proof to the effect that in the building supply industry on the Peninsula it is common practice for owners or general contractors, in payment for materials supplied subcontractors by material companies, to either make the checks payable jointly to the subcontractor and/or the various supply houses, or to take orders in favor of the material men for materials furnished on

(Testimony of Harold E. Casey.)

subcontracts, drawn against the lending institution or the financing agency, and/or to take assignments covering the amount of material supplied by the material companies to the subcontractors working under general contractors or owners; and, that that practice was followed at the time of this assignment and had been followed for a great period of time prior thereto, and the same practice continued up to the time of the cessation of building generally, due to the curtailment of building activities, due to the war, and still exists where such buildings are allowed to be constructed at the present time.

"The Referee: You have your offer for the record. [100]

"Mr. Mullin: Q. Is Scardino indebted to you at this time, Mr. Casey?

"The Witness: A. He is.

"Q. And the amount is the amount set forth in your answer, $1,031.52? A. Yes.

"Q. Did you or not lien any of the Conway and Culligan jobs? A. Did we lien?

"Q. Yes? A. No, we did not lien.

"Q. The reason you did not lien them was what?

"Mr. Margolis: We object on the ground that it is suggestive and leading and on the further ground that it is incompetent, irrelevant and immaterial.

"The Referee: The objection may be overruled.

"Mr. Mullin: Will you please repeat the question?

"(Question read.)

(Testimony of Harold E. Casey.)

"Mr. Margolis: I object on the ground that the question is leading and suggestive.

"The Referee: He asks for his reason. How else could he get it?

"Mr. Margolis: Very well.

"The Referee: It may be overruled.

"The Witness: A. The reason why we did not lien was because they had made arrangements under this assignment to pay us $2,035.39, if I remember right.

"Mr. Mullin: Q. The amount set up by the answer? A. That is right.

"Q. And those amounts were received by you?

"A. That is right.

"Mr. Mullin: That is all.

"Redirect Examination

"Mr. Margolis: Q. You never filed a lien on any of these jobs in controversy, did you, Mr. Casey? A. No.

"Q. Did you bring your file here in connection with all [101] the transactions with Mr. Scardino from the time you started to do business with him four or five years ago?

"A. I have a ledger sheet.

"Q. Anything other than a ledger sheet?

"A. No.

"Q. There is nothing else in the file but the ledger sheet that you brought with you?

"A. That is right, besides these papers.

"Mr. Mullin: That is the file you have been referring to, Mr. Margolis.

(Testimony of Harold E. Casey.)

"Mr. Margolis: Yes, the file he brought with him.

"Q. Have you any other assignments in your file from Mr. Scardino?

"A. We had over the period of years, yes.

"Q. Anything recently other than those to which we have referred? A. Not for this period.

"Q. Except those to which we referred?

"A. Yes.

"Mr. Margolis: That is all.

"Mr. Pardini: Q. Mr. Casey, you have been in the supply and material business a long time, have you not?

A. Yes.

"Q. And you are familiar, when you mention that you did not lien a job, you are familiar with the fact that a lien is the recourse of a material man against the owner of the property?

"A. That is right.

"Q. Who may or may not have paid his money to the contractor in chief, and in turn, that may be in the hands of the subcontractor, or if someone along the line does not pay the material man, he has what is known as lien rights?

"A. That is why we have taken the privilege of making the payments direct.

"Q. When Barrett & Hilp, for instance, buy material of you, they don't give you an order to pay direct for one of their jobs, do they?

"A. They buy direct.

"Q. Orders for payment direct to the material

(Testimony of Harold E. Casey.)

men [102] are always given where the credit question is not determined?

"A. It follows through on the subcontractor.

"Q. You have a lien right in any case where you are not paid by the subcontractor or the contractor?

"A. That is right, and in this case——

"Mr. Mullin: I don't want to seem technical, but I object to this line of questioning as entirely incompetent, irrelevant and immaterial. Those are matters of law. The Court will take judicial knowledge.

"The Referee: That is true.

"Mr. Pardini: Q. Scardino's present indebtedness is $1,031.52, at the present time, to you?

"A. If that is the correct amount.

"Q. And what was it on January 31, 1942? Can you determine that from this ledger sheet?

"A. I should be able to.

"Q. You testified, I think, previously that it was $4308.73 on January 26th?

"Mr. Mullin: What date?

"Mr. Pardini: On January 26th. I have a note here that Scardino then owed you, that is January 31, 1942, owed you $4,308.73. Would your records show that?

"Mr. Mullin: $4,308.73, from the ledger card.

"Mr. Pardini: Q. Now, have you any record that would show a checkup of how old the items of indebtedness representing the $4,308.73 were on January 31, 1942?

"A. It is right there.

(Testimony of Harold E. Casey.)

"Q. No, this, Mr. Casey, is apparently a ledger sheet starting January 20, 1942.

"Mr. Mullin: There were earlier ones. Scardino's account, over a long period of time, ran from $3,700 to $4,600, or thereabouts.

"Mr. Pardini: For the preceding year, it was about the same amount? [103]

"Mr. Mullin: There were regular credits and regular charges over that period of time.

"Mr. Pardini: But on January 31, 1942, there was $4,309.73 due on an open account. That is all; no further questions.

Recross Examination

"Mr. Mullin: Q. Just one further question. Mr. Margolis asked you about other assignments, if you had any information regarding them. Can you tell me whether or not the other assignments were paid, referring to the earlier assignments?

"A. Those assignments had been paid.

"Mr. Margolis: I was not referring to other assignments.

"Mr. Mullin: That was my understanding.

"The Referee: That was your question, Mr. Margolis.

"Mr. Margolis: If it was, I might correct it by saying this: My notes reveal that during the last hearings these names were mentioned: Schmidt, Donald Johnson, Gus Johnson, and Stanley W. Younger. We had taken care of the Schmidt proposition with these documents which are in evidence, plus the testimony of the $252.35 paid and the ref-

(Testimony of Harold E. Casey.)

erence to the $246.50. We took care of the Stanley W. Younger proposition with the testimony of the lien. I had reference to Donald Johnson and Gus Johnson.

"Mr. Mullin: Mr. Casey testified previously that they comprise the amount still due. There may be some others, but those two comprise the major portion.

"Mr. Margolis: That is what I was referring to, if his file would show anything, any assignment with respect to those and whether they had been paid.

"Mr. Pardini: Of course, it is argumentative, but apparently $1,035 is now due and owing. It was $4,308. [104] That is, $3,277 has been collected somewhere. Now, we have an account of $2,534.79, roughly, which would leave some $700, $800 or $900.

"Mr. Margolis: Unaccounted for. That is what I had in mind.

"Mr. Mullin: Unaccounted for?

"Mr. Pardini: It is collected. We don't know how or when, collected after January 31, 1942, by H. E. Casey Company.

"Mr. Mullin: The ledger card shows its receipt during that period.

"Mr. Pardini: That is what counsel is asking you, and whether there were dealings with other contractors. Call Mr. Scardino while he is here and we may be able to clear that up.

"(Witness excused.)

"GEORGE FERRIS,

called for the Trustee; Sworn.

"Mr. Margolis: Q. Mr. Ferris, you received some moneys from Conway and Culligan in February of 1942?

"A. We received money, but it does not specify on the sheets who it is from.

"Mr. Hoffman: I will stipulate, if Your Honor please, with Mr. Margolis that I have heretofore submitted a statement of the account taken from the records of the San Mateo Feed and Fuel Company. The bookkeeper got this account up for me and it shows that there were certain payments. It may show—it doesn't either. The inference is that the payment of February 24, which Mr. Ferris refers to there, comes from certain Conway and Culligan jobs. I have the job numbers here and they correspond with the numbers Mr. Margolis has, except his total is $323, while the total payment shown there is $276.15. Now, there may have been a material credit or something in there. Apparently these [105] figures are from Conway and Culligan and they show that payment made and there is a discrepancy there of some $46. I think I would be prepared to stipulate that those moneys were received, subject to correction. It is possible the bookkeeping office can account for the discrepancy. I can send it to you.

"Mr. Margolis: That is all right. It won't be less than $276.15.

"Mr. Hoffmann: It won't be less than $276.15. That shows on the ledger sheet as being paid.

(Testimony of George Ferris.)

"Mr. Margolis: And it will not be more than $323.

"The Referee: Very well.

"Mr. Margolis: Q. Do your records also show that on March 12, 1942, you received $97.08?

"A. Yes.

"Q. On the Schmidt jobs?

"A. I don't know what job.

"Mr. Hoffmann: Going to that again: Mr. Ferris, those are figures furnished me by the office, which I furnished to Mr. Margolis. The amount shows on the ledger sheet; what the jobs were shows on this statement.

"The Witness: A. $97.08?

"Mr. Margolis: Yes.

"Q. Now, your records also show that on February 19, 1942, you received $237?

"A. Yes, but that check came back.

"Q. And then was repaid on October 27, 1942?

"A. Right.

"Q. On February 10th, $180? A. $189.

"Q. Was that January 1st, the $189, Mr. Ferris?

"A. No, February 10, cash $189.

"Q. On the Steiner job at Burlingame?

"A. Mr. Hoffman might have that.

"Mr. Margolis: There has been an error in copying that, because the original sent me was $180. There are two [106] items: One of $180 and one $189.

"Mr. Hoffmann: There is an error there some place. $189 is what you show on the ledger?

(Testimony of George Ferris.)

"A. Yes.

"Mr. Margolis: Q. And on January 1st do you have a payment there, Mr. Ferris? A. $189.

"Q. And December 30, 1941? A. $46.12.

"Mr. Margolis: Will you stipulate, Mr. Hoffmann, in the interest of saving time, that the amount of $1,025.37, subject to correction, for the Conway and Culligan jobs, were moneys received by your client, The San Mateo Feed & Fuel Company, between December 29, 1941, and the date of the filing of the petition?

"Mr. Hoffmann: That is what the figures show; I have not added them.

"Mr. Margolis: I am just taking these two items.

"Mr. Hoffmann: I will stipulate that is what the figures show, but I won't stipulate to your mathematics.

"Mr. Margolis: $1,025.35.

"Mr. Hoffmann: Well, it shows on December 30th $46.12; January 1st, $189; January 10th, $189.

"Q. Is that $189, Mr. Ferris?

"A. Well, $187.

"Mr. Hoffmann: Q. The Steiner job on February 19th, $237?

"A. Yes, that was returned.

"Q. But was subsequently paid, the check made good? A. Yes.

"Mr. Hoffmann: Conway and Culligan, $276.15?

"A. Yes.

"Mr. Hoffmann: The two Schmidt jobs, $97.08.

(Testimony of George Ferris.)

And that stipulation is subject to my check with the office girl to see how she designated 'Schmidt' and so forth to each job. I assume it is correct, but I want to check.

"Mr. Margolis: All right.

"Can Mr. Ferris state what the record shows as to how much he received between December 29 and the time the schedules [107] were filed April 29th?

"Mr. Hoffmann: We can show the balance here. What date *to* you want?

"Mr. Margolis: December 29.

"Mr. Hoffmann: On December 29 the balance Scardino owed was $1,457.96. Now, there were charges almost daily, you see, following that. What was the last date you wanted?

"Mr. Margolis: April 29th or the last entry.

"Mr. Hoffmann. The last entry we have is March 24 and it shows a balance due then, March 24th, this check is carried over, so on March 24th the balance would be $1,009.11. During that period the highest balance that he owed was on February 10th; that was $1,838.26. I mean, there is a debtor and creditor relationship running all through there.

"Mr. Margolis: Q. Now, Mr. Ferris, were these collections from the Steiner jobs and the Schmidt job and the Anchor Salon job handled in the same fashion that the Conway and Culligan payments were handled, do you know?

"The Witness: A. They were handled by our collection man. He had to go after them all.

(Testimony of George Ferris.)

"Q. Do the records reveal that you have any assignment there?

"A. No, Mr. Hoffmann had any assignments we had.

"Mr. Hoffmann: I have here, and I have had a careful check made of the assignments; the assignments are all dated February 17, 1942. One is to John L. Steiner, one to Gus Johnson—none of them are paid.

"Mr. Margolis: None of them?

"Mr. Hoffmann: No.

"Mr. Margolis: Don't these amounts refer to those?

"Mr. Hoffmann: No, these are dated February 17th; and Donald Johnson.

"Mr. Margolis: I will make a list of these later. In [108] the interest of time.

"Mr. Hoffmann: I can forward you this.

"Mr. Margolis: I will appreciate that.

"Mr. Pardini: Give the total.

"Mr. Hoffmann: There are seven, totalling $1,006.17.

"Mr. Margolis: Do your records show whether there was an assignment from Scardino to Conway and Culligan on this $276.15, Mr. Hoffmann?

"Mr. Hoffmann: No. We had no assignment whatever from Conway and Culligan. The only assignment that I know of is the assignment in evidence which Mr. Mullin showed me the other day. It did not come to our files, evidently it was made without the knowledge of anyone from the

(Testimony of George Ferris.)

San Mateo Feed & Fuel Company, unless it was the credit manager.

"Mr. Margolis: Any assignment made——

"Mr. Hoffmann: The only answer was, the payments were paid subsequent to the date of the assignment, the payments we were discussing on the Conway and Culligan jobs.

"Mr. Margolis: That is what I had in mind.

"Mr. Hoffmann: Apparently they were received subsequent to that assignment, but no one in the San Mateo Feed & Fuel Company knew of the existence of the assignment. You remember when you phoned me I told you there was no assignment.

"Mr. Margolis: Would you stipulate that this $276.15 was received by your client directly from Conway and Culligan pursuant to this assignment?

"Mr. Hoffmann: No, I won't.

"Mr. Pardini: You will stipulate it was received afterwards?

"Mr. Hoffmann: There is no question of that; the record shows that.

"Mr. Margolis: Q. Were you in the office of Conway and Culligan when this was prepared, Mr. Ferris? [109]

"The Witness: A. No, sir.

"Q. Did you know anything about it?

"A. I never knew Mr. Conway or Mr. Culligan. I don't know either one.

"Q. Do you know whether someone connected with your firm was in Conway and Culligan's office?

"A. Possibly our credit man was.

(Testimony of George Ferris.)

"Q. What is his name?

"A. John De Monte.

"Q. Do you know where he is now?

"A. No, sir.

"Q. Do you know where he is employed?

"A. No, sir.

"Q. Do your records show his last known address? A. Yes.

"Mr. Margolis: I wonder if you would supply that?

"Mr. Hoffmann: Isn't that his address on those records? I think that is what the girl told me.

"The Witness: A. Maybe that is who it is. I don't know. It does not give his name.

"Mr. Hoffmann: I think he was working at the Southern Pacific. I think that is what the girl told me, because I asked her that myself.

"Mr. Margolis: In all events, the record shows that $276.15 was received by the San Mateo Feed & Fuel Company subsequent to the execution of the assignment. There is no question of that.

"Mr. Hoffmann: Well, the assignment is dated February 20th and the payment was received February 24th. There cannot be much question about it.

"Mr. Margolis: That is De Monte?

"The Witness: A. That is De Monte.

"Mr. Margolis: Q. What is his first name, do you know? A. John.

"Mr. Margolis: I believe I will offer these in evidence and ask that they be marked.

"The Referee: Trustee's Exhibit No. 4. **[110]**

(Testimony of George Ferris.)

"Mr. Margolis: Copies of seven documents.

"The Referee: Very well.

"Mr. Margolis: That is all.

"Cross Examination

"Mr. Hoffmann: Q. Mr. Ferris, this assignment dated February 20, 1942, purporting to have been drawn by Conway and Gulligan, mentioning the San Mateo Feed & Fuel Company, that is the assignment you referred to as never having seen before?

"A. Yes.

"Q. It was not in your possession?

"A. No.

"Q. It was not until I advised you of the existence that you knew of it? A. No.

"Q. There are no further assignments in the file from Conway and Gulligan?

"A. I don't think so.

"Q. So far as you know no money was paid pursuant to the assignment? A. No.

"Q. The only assignments you had were those just offered by the trustee? A. Yes.

"Q. And no moneys were received on account of them? A. No.

"Q. You have known Mr. Scardino a number of years, have you not?

"A. Oh, yes, a matter of six or seven years.

"Q. You have done business with him over that period of time? A. Yes.

"Q. Have your business relationships been dif-

(Testimony of George Ferris.)

ferent, were they any different in February of 1942 than at any other time?

"A. Not as far as I know.

"Q. By the way, what is your capacity with the San Mateo Feed & Fuel Company?

"A. Vice president and general manager.

"Q. You have charge of the three offices. Is that [111] correct? A. Yes.

"Q. Supervision of the credits? A. Yes.

"Q. Did you know of, or did anyone ever report to you any insolvency of Mr. Scardino?

"A. No.

"Q. Your relationship with him was as it had been over the past few years? A. Yes.

"Q. By the way, the San Mateo Feed & Fuel Company was not listed as a creditor, either, were they, in the bankruptcy proceedings?

"A. That I don't know.

"Mr. Hoffmann: The record would show.

"The Referee: The record would show.

"Mr. Hoffmann: Q. You never filed a claim, did you? A. No.

"Mr. Hoffmann: I think that is all.

"Redirect Examination

"Mr. Margolis: Q. How long did Mr. De Monte work for you, Mr. Ferris?

"A. I should judge about a year.

"Q. And what was his title?

"A. Credit Manager.

"Q. He discussed all matters with you in connection with these accounts?

(Testimony of George Ferris.)

"A. As a rule he did, as a rule.

"Mr. Margolis: That is all.

"Mr. Pardini: Q. You know, of course, Mr. Casey of the H. E. Casey Company, don't you?

"A. Yes, sir.

"Q. You stated here, that so far as you know, there are no other assignments in your possession other than those counsel has given us. No other than those in your possession?

"A. Not that I know of.

"Q. You yourself did not go after the collections of the bills, did you? A. No, sir.

"Q. You had somebody else do that. For how many years before 1942 did you have other people collect your bills for you, that is, out of your office, just as a special [112] officer for that purpose?

"A. Oh, I should judge ten years that I know of.

"Q. So far as you know you never got on any single day during all the time you did business with Joe Scardino, you never got a list of assignments such as this, did you? A. No.

"Q. I think it is your testimony that you had nothing to do actually with getting this assignment, someone else got them, probably Mr. De Monte?

"A. Probably.

"Q. You don't know the occasion or who was present when they were signed, do you?

"A. No.

"Q. Or the reason he had them signed? You don't know that? All that would be in charge of the credit manager who was being paid to protect the

(Testimony of George Ferris.)

company of which you are vice president and general manager? I mean, with which you are connected?

"A. We were leaving it to his judgment. That is what he was paid for.

"Mr. Pardini: I think that is all.

"Mr. Margolis: That is all, Your Honor.

"(Witness excused)

"Mr. Mullin: Just one more question I want to ask Mr. Casey.

"HAROLD E. CASEY,

"Recalled for Respondent;

"Direct Examination

"Mr. Mullin: Q. Did Mr. Scardino ever tell you, Mr. Casey, around the date of this assignment or immediately prior to that, that is, February 20th, did he ever tell you he was broke or could not pay his bills?

"A. He did not.

"Q. Have you filed a claim against the estate here for $1,035?

"A. You mean in bankruptcy? [113]

"Q. Yes? A. No, I have not.

"Mr. Pardini: May I, with the Court's permission, ask a couple of questions?

"The Referee: How long are you going to be?

"Mr. Pardini: One minute.

(Testimnoy of Harold E. Casey.)

"Cross Examination

"Mr. Pardini: Q. You also had collection and credit managers in your business?

"A. That is right.

"Q. During all the time here involved?

"A. That is right.

"Q. And Mendich was one of them?

"A. That is right.

"Q. And he was the man who drew up the assignments in question, if they were drawn up?

"Mr. Mullin: Wait a minute. Which assignment?

"Mr. Pardini: Q. He would have had charge of regulating the credit of anyone who owed you money?

"A. No, because I always was advised of what was going on.

"Q. Did you ever, before this time, get a batch of assignments such as have been introduced in evidence, from Mr. Scardino?

"A. I would say we had, yes.

"Q. That many in a single day?

"A. Oh, no.

"Q. As on the single date, February 17th?

"A. But assignments.

"Q. Or orders on specific jobs. Never before had you gotten that number from Mr. Scardino?

"A. I did not get any numbers.

"Mr. Mullin: We have no other assignment except the first letter from Conway and Culligan.

"Mr. Pardini: Q. You don't know whether

(Testimnoy of Harold E. Casey.)

Mr. Mendich drew these up or got them up himself?

"A. Yes, I was there the morning this all went on.

"Q. You say you knew about it? [114]

"A. I knew about the letter.

"Mr. Pardini: I would like this marked for identification.

"Mr. Mullin: That one never has been executed.

"The Referee: Trustee's Exhibit 'A' for Identification.

"How long will you be when you take this up again?

"Mr. Mullin: I thought we were concluded.

"Mr. Margolis: Concluded.

"The Referee: How many days do you want to brief it?

"Mr. Margolis: Ten and ten.

"The Referee: Ten, ten and five.

"(Submitted 10-10-5)"

(See original of said Reporter's Transcript on file in the office of the Clerk of this Court.)

On September 15, 1943, the following order was entered herein:

"This matter comes before the court on the petition of G. S. Hayward, the trustee of the estate of the above-named bankrupt, represented by Max H. Margolis, Esq., the order to show cause based upon said petition, the answer of San Mateo Feed & Fuel Co., a corporation, represented by F. E. Hoffmann, Esq., the answer of H. E. Casey Com-

pany, represented by Hugh F. Mullin, Jr., Esq., and the evidence taken upon said petition, order to show cause and said answers. The matter having been submitted on briefs, and the briefs having been filed and considered by the court in connection with the allegations of the petition, the answers thereto, and the evidence offered and received in connection therewith, and the court being fully advised in the premises, finds that no proof has been offered and/or received showing that, at the time either of the assignments referred to in said petition was made by said bankrupt, the aggregate of the [115] property of said bankrupt, exclusive of any alleged property which said bankrupt may have conveyed, transferred, concealed, removed or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, if such said bankrupt did, then was not, at a fair valuation, sufficient to pay his debts.

"Upon the record presented herein, the court concludes as a matter of law that such trustee, upon the petition and order to show cause now before the court, is not entitled to a turn-over of any part of the money referred to in either of the assignments referred to in said petition.

"It, Therefore, Hereby Is Ordered, Adjudged and Decreed that the trustee's said petition be, and it is, Dismissed, and that the order to show cause based thereon, be, and it is, Discharged, without prejudice, in each instance, to said trustee's, within ten (10) days from date hereof, taking such further

steps as said trustee may be advised in connection with each of said assignments, by virtue of the provisions of Section 70(e) of the Bankruptcy Act.

"Dated: September 15th, 1943.

"BURTON J. WYMAN

"Referee in Bankruptcy"

(See original of said order on file in the office of the Clerk of this Court.)

Thereafter, and on September 24, 1943, the following verified petition for review was filed with me on behalf of the trustee:

"Now comes your petitioner G. S. Hayward and respectfully represents:

"That the above named Bankrupt filed his voluntary [116] petition in Bankruptcy on April 29, 1942, and was duly adjudicated a Bankrupt by the above entitled court on April 30, 1942. That thereafter and on May 21, 1942, your petitioner was duly appointed Trustee of the estate and effects of said Bankrupt, and ever since said date she has been and now is the duly appointed, qualified and acting Trustee of the estate and effects of said Bankrupt.

"That on April 2, 1943, petitioner filed her duly verified petition for an Order to Show Cause to issue requiring the therein named Respondents H. E. Casey Company and San Mateo Feed & Fuel Co., to appear and show cause before said Referee in Bankruptcy, why an order should not be made directing said Respondents to turn over, to peti-

tioner as such Trustee, certain money paid to them and each of them by the Bankrupt within four months of the filing of his petition in Bankruptcy, on the ground that said payments constituted voidable preferences. That said Respondents respectively filed their duly verified answers to Trustee's said petition and appeared pursuant to said Order to Show Cause before said Referee in Bankruptcy.

"That a hearing thereon was had on April 12, 1943, before said Referee in Bankruptcy and the matter was thereafter submitted on briefs filed in these proceedings. That said Referee in Bankruptcy on September 15, 1943, made his Order denying the prayer in said petition, in the manner following:

[Order referred to omitted for sake of brevity, said order hereinbefore being set forth in full.]

"That said order is erroneous and petitioner is aggrieved thereby in the following particulars:

"That to permit said order to stand would unjustly deprive Bankrupt's remaining creditors of their fair and equitable share in the assets of his estate, and unjustly [117] enrich Respondents.

"That there is sufficient testimony in the record to support a finding of the Bankrupt's insolvency. The record is replete with uncontradicted testimony showing facts and circumstances from which the court could and should have drawn the inference of the Bankrupt's insolvency at the times the several preferences were made to the Respondents. The manner in which the preferences were obtained, the activities of Respondents and their respective agents, and the information they and each of them

were in a position to ascertain and in fact did ascertain, all tend to support the Bankrupt's insolvency.

"To supplement and further support the fact of Bankrupt's insolvency, your petitioner respectfully makes the following offer of proof:

"Petitioner offers to prove:

"1. That within four months of the filing of Bankrupt's petition herein, and more particularly between December 30, 1941, and the date upon which he filed said petition, April 29, 1942, and upon each and every intervening day, the aggregate of all Bankrupt's property, exclusive of the total sums conveyed by him to the Respondents herein, was not, at a fair valuation thereof, sufficient to pay his debts.

"2. That Respondents actually knew Bankrupt's financial condition was such that in January, 1942, he was compelled to and did close his busines and had no money or property with which to pay all of his outstanding debts; that this condition existed not only at the time of the closing of the same, but also continually for more than one month prior thereto and continually thereafter up to and including April 29, 1942.

"3. That Respondents had reasonable cause to believe [118] Bankrupt was insolvent within the meaning of the Bankruptcy Act, at the times they received said payments.

"4. That by the very manner in which Respondents obtained the preferential payments, and their

activities leading up to their *aquiring* said payments, Respondents knew they were obtaining preferences.

"That said offer of proof is supported by the affidavit of Joseph Louis Scardino, the Bankrupt herein, and the same is hereto attached and made a part hereof.

"It is respectfully urged that these proceedings be certified to the United States District Court Judge, as in such cases made and provided, for a consideration of said order and the same be reversed, or in the event said United States District Court Judge should, under all of the facts and circumstances contained in the record and upon the consideration of those herein set forth, deem it proper in the premises that this matter be remanded to the Referee, then the record herein and the proceedings thereunder be returned to said Referee with instructions to take such further and other proceedings in accordance with Section 2.a(10) of the Bankruptcy Act, as may be proper in the premises.

"Wherefore, your petitioner prays for a review of said Order by the United States District Court Judge, and upon the conisderation thereof, said Order be reversed, or should it appear to said United States District Court Judge that this matter is within the purview of Section 2.a(10) of the Bankruptcy Act, and should said Judge deem it proper, then the record herein be returned to the Referee with instructions for further proceedings

as may be appropriate in the premises, and for such other and further order for which no previous application has been made.

"G. S. HAYWARD
"Petitioner
"MAX H. MARGOLIS
"Attorney for Petitioner."

[119]

[Verification omitted for sake of brevity.]

The affidavit hereinbefore referred to is as follows:

"AFFIDAVIT OF JOSEPH LOUIS SCARDINO

"United States of America
Northern District of California
City and County of San Francisco—ss.

"Joseph Louis Scardino, being first duly sworn, deposes and says:

"That I am the person named and described in the above entitled proceedings; that I filed my duly verified, voluntary petition herein on April 29, 1942, and was duly adjudicated a bankrupt by the above entitled Court on April 30, 1942.

"That for many months prior to February 16, 1942, my business as a plaster-contractor was steadily getting worse and a *a* short time prior to that date, I called upon my attorney for counsel and advice regarding my general business affairs and the pressure being exerted upon me by several of

my creditors, discussed with him the matters covering certain tax liabilities and the possible filing of a voluntary petition in bankruptcy, and left with him for inspection whatever books, records, papers and documents I then had, a portion of which had theretofore been placed for safe keeping in a friend's garage under lock and key and when the door of the same was inadvertently left unlocked, said portion of said records were chewed up, mutilated and destroyed by a dog. That my attorney prepared my said voluntary petition and the accompanying schedules which I verified under oath on said February 16, 1942, and the same were duly filed as aforesaid on April 29, 1942. That for some time prior to said February 16, 1942, and up to and including said April 29, 1942, my attorney conducted [120] negotiations with creditors to whom I was indebted for wage claims and with other creditors to whom I was, and continued to be indebted for various taxes, all tending toward the settlement and liquidation of the same but without effect.

"That during the conferences had with my attorney, and within four (4) months of the filing of my said petition, I informed him that I was being hard pressed by certain of my general creditors and was requested to and did make substantial payments to H. E. Casey and Company, and San Mateo Feed & Fuel Co., also that they and each of them requested me to execute certain assignments conveying moneys due to me from one of my general con-

tractors, and when I informed him that by virtue of said assignments and the payments made to them, their respective claims would be paid in full, and that there might possibly be a credit coming to me, I was advised that their names need not be listed in my schedules among the unsecured creditors or otherwise.

"That within four (4) months of the filing of my said petition, and more particularly between December 30, 1941, and March 12, 1942, inclusive, said San Mateo Feed & Fuel Co., received the total sum of $1025.35 from me and from persons who were indebted to me in my operations as a plaster-contractor; and during said four (4) months period, and more particularly on or about January 20, 1942, and between February 18, 1942, and about March 14, 1942, said H. E. Casey and Company received the total sum of $2534.76 from me and from persons who were likewise indebted to me in my said operations as a plaster-contractor; that during said times and on each of said dates respectively, the total fair market value of all my property, both real and personal, not including the aforesaid amounts paid to said creditors, was not suffi- [121] cient to pay all of my debts. That on each of said dates the total of all my debts, exclusive of the amounts owed to said creditors herein named, was the approximate sum of $3227.42. That on each of said dates the fair market value of all of my assets did not exceed the sum of $850, made up of the following: an unimproved piece of real prop-

erty located at 9th and Bayshore Highway, San Mateo, California, standing of record in my name and the name of my wife, Nettie Scardino, as joint tenants, the fair market value of which was $250; a 1935 Chevrolet Truck, (1½ Tons), the fair market value of which was $150; cash on deposit with the Bank of America N. T. & S. A., San Mateo Branch, San Mateo, California, in the approximate sum of $50, held under a writ of attachment which was levied more than four (4) months prior to the filing of my said petition, and which was paid over to the State Compensation Insurance Fund on or about April 20, 1942, pursuant to a writ of execution issued out of the suit brought against me by said Fund; my tools, plaster boards, two water hoses, two hoes, mortar boards, mixing box, and mixed tools, the fair market value of which was $400, and which I claimed exempt.

"That during said four (4) months period and for many months prior thereto the credit managers of both of said creditors called upon me frequently and I advised them of my insolvent condition. Notwithstanding, they arranged with my general contractors that all moneys which were due and owing to me should be paid by checks drawn payable to me and them respectively, all without my consent and against my wishes and instructions.

"That I ceased operating my business as a plaster-contractor during the latter part of January, 1942, due to my financial inability to carry on the same, and this fact, [122] was at the time, well

known to both of said creditors. That for at least thirty (30) days prior to said latter part of January, 1942, one Bud Murray, connected with said San Mateo Feed & Fuel Co., called on me twice and three times weekly regarding payment of my account with his firm, and I repeatedly advised him of my financial condition and informed him that I intended to and did close my business in January, 1942.

"That at no time, nor upon any date, between December 30, 1941, and the date of the filing of my petition in bankruptcy on said April 29, 1942, was the aggregate of all of my property at its fair market value, exclusive of the sums conveyed to the two creditors as aforesaid, sufficient in amount to pay all of my debts outstanding as of said time or times, date or dates.

JOSEPH LOUIS SCARDINO

"Subscribed and Sworn to before me this 23rd day September, 1943.

LOUIS WIENER

Notary Public in and for the City and County of San Francisco, State of California."

(See original of said petition for review, with affidavit attached, on file in the office of the Clerk of this Court.)

On September 30, 1943, the referee's certificate and report on said order of September 15, 1943, was filed with the District Court. In said last men-

tioned certificate and report, on pages 11 and 12 thereof, under the heading, "Discussion By and Opinion of Referee," the [123] following language appears:

"At the time I entered the complained-of order, I was of the opinion that, upon the evidence presented on April 12, 1943, as such evidence is shown by the Reporter's Transcript, (handed up herewith as a part of this certificate and report), there was no order which legally I could enter other than the one dismissing the trustee's petition and discharging the order to show cause based on said petition. However, with the record in its present state—and I refer particularly to the affidavit of the bankrupt attached to the aforesaid petition for review—I am of the opinion that the court, in the interest of equity and justice, particularly, so far as creditors' rights are concerned, and also in the exercise of sound discretion, is authorized by law to return the herein records, and the matters covered thereby, to me, as the referee in charge of these proceedings, with instructions to take such further proceedings as are warranted in the premises.

"As legal justification for such procedure, see section 2a(10) of the Bankruptcy Act [11 USCA, §11a(10)]."

(See original of said last mentioned certificate and report on file in the office of the Clerk of this Court.)

On October 4, 1943, the following order was entered in the District Court:

"This matter came on regularly this day for hearing on the Referee's Certificate on Petition for Review, whereupon the Court ordered that the Record of Proceedings [124] herein be returned to the Referee for further poceedings, in accordance with his request and Title 11 U.S.C.A., Section 11 (10)."

(See original of said order on file in the office of the Clerk of this Court.)

Thereafter, and on November 22, 1943, after due notice to interested parties, the aforesaid petition for turn-over order came on for further hearing before me, at which time there appeared, Max H. Margolis, Esq., the attorney for the trustee, Julian Pardini, Esq., the attorney for the bankrupt, F. E. Hoffman, Esq., the attorney for San Mateo Feed & Fuel Co., and Hugh F. Mullin, Jr., Esq., the attorney for H. E. Casey Company. During the course of said hearing, the following proceedings were had:

"JOSEPH L. SCARDINO,

"Called for Tustee, Sworn:

"Mr. Margolis: This matter comes before Your Honor pursuant to notice served upon the Respondents, San Mateo Feed & Fuel Company, a corporation, and H. E. Casey & Company, for further hearing of the Trustee's petition for a turn over order. There was considerable argument made and reference made to the bankrupt's schedule, both in oral argument by counsel for the Respondents, and

(Testimony of Joseph L. Scardino.)

in the written memoranda. We, therefore, ask at this time, if it please Your Honor, that the petition and schedules be introduced in evidence and marked as a portion of the record, by designating it Trustee's Exhibit 'A'.

"The Referee: They are part of the record anyway.

"Mr. Margolis: Yes, but I would like to offer them in evidence, Your Honor.

"The Referee: You don't have to do it. Under the Federal rule, they are before the Court and the Court will take into consideration everything in the record. [125]

"Mr. Margolis: Very well.

"Mr. Margolis: Q. You will recall that in the testimony you gave on several occasions in this matter, you made references to several of the credit managers representing the Respondents, H. E. Casey & Company and San Mateo Feed & Fuel Company? A. Yes.

"Q. You mentioned in your affidavit, one Bud Morrow?

"A. That was a fellow that worked for San Mateo Feed & Fuel; he manufactured the stucco.

"Q. He manufactured the stucco? A. Yes.

"Q. And, what connection did you have with him?

"A. He used to come around on my jobs and try to collect some money.

"Q. Did you purchase the stucco from the San

(Testimony of Joseph L. Scardino.)

Mateo Feed & Fuel Company through Mr. Morrow?

"A. I didn't get you.

"Q. Did you purchase the stucco from the San Mateo Feed & Fuel Company through Mr. Morrow?

"A. Yes, I used to buy through Morrow and he gave the order to the office.

"Q. He was the one, you say, who manufactured the stucco for San Mateo Feed & Fuel Company?

"A. Yes, sir.

"Mr. Hoffmann: Just a minute, Your Honor. We object to this line of questioning until there is some evidence of agency shown between Moore and San Mateo Feed & Fuel Company.

"Mr. Margolis: This is just preliminary.

"The Referee: Can you connect it?

"Mr. Margolis: I don't know whether I can connect it directly by this witness or whether I will have to call Mr. Ferris.

"The Referee: It may be admitted subject to being [126] connected.

"Mr. Mullin: I don't want to interrupt, if it please the Court, but I want to interpose an objection so far as this is concerned, dealing with H. E. Casey & Company.

"The Referee: Very well.

"Mr. Mullin: That goes to the entire line.

"The Referee: Yes.

"Mr. Margolis: Q. Did you at any time give checks or cash to Moore? A. I gave checks.

"Q. To Moore?

(Testimony of Joseph L. Scardino.)

"A. The check was made jointly.

"Q. Jointly to whom, San Mateo Feed & Fuel?

"A. Yes, and to me.

"Q. Where did you get those checks from?

"A. From the General Contractor. I cannot remember from who.

"Q. To you remember on how many occasions you gave payments to Morrow that way?

"Mr. Hoffman: For your own information, the man's name is not Morrow, but Moore.

"Mr. Margolis: Thank you very much.

"Mr. Hoffmann, representing the San Mateo Feed & Fuel Company has corrected me. He says the man's name is not Morrow, but Moore. We will ask that the entire record, where reference is made to 'Morrow', be corrected to read 'Moore', particularly the bankrupt's affidavit on file; that every place where the name 'Morrow' appears, it be changed to read 'Moore'.

"Q. How long have you known Moore?

"A. I know him since late 1937.

"Q. Was he connected with San Mateo Feed & Fuel Company, to your knowledge at that time?

"A. No.

"Q. And, do you know when he became connected with San Mateo Feed & Fuel Company?

"A. I could not tell.

"Q. Approximately?

"A. I cannot tell exactly, [127] but I would say around 1940 or late 1939; around there; I could not say exactly.

(Testimony of Joseph L. Scardino.)

"Q. You just testified you gave Mr. Moore a check made payable to you and San Mateo Feed & Fuel Company jointly? A. Yes.

"Q. And that you obtained the check from one of your General Contractors? A. Yes.

"Mr. Hoffmann: Can we get the time of the check and by whom drawn?

"The Referee: He says he cannot remember by whom it was drawn.

"Q. Can you give the date?

"A. I cannot remember. It was 1940, 1941. He used to come pretty nearly every week and see me about money.

"Q. That was 1940 or 1941? A. Yes.

"Q. Which?

"A. Well, it was in both years, late 1940.

"Q. You gave him checks both years?

"A. Two or three times I gave him a check to bring in the office.

"Q. In 1940 and 1941? A. That is right.

"Mr. Margolis: Q. You say you gave him two or three checks? A. That is right.

"Q. Drawn payable to you and the San Mateo Feed & Fuel Company?

"A. Yes. A couple of times I think I gave him some cash too.

"Q. And those moneys were credited to your account at the San Mateo Feed & Fuel Company?

"A. Yes.

"Q. You say in your affidavit that you spoke with Mr. Moore in January of 1942?

(Testimony of Joseph L. Scardino.)

"Well, he came around in 1940 and told me that he had to have some money.

"Q. For whom did he tell you he had to have some money? [128]

"A. For San Mateo Feed & Fuel Company.

"Q. What did you tell him at that time?

"A. I tell him I haven't; I am broke; I got no money and unless I collect, I cannot give you another penny.

"Q. Tell me, did you speak to him about closing up your operations at that time? A. Yes.

"Q. When was that?

"A. It was around January, 1942; it would be January 15th, something like that, you know. I cannot exactly say the date.

"Q. When did you actually close your operations? Do you know?

"A. Somewhere in February.

"Q. Of 1942? A. Yes.

"Q. At the time you made these payments to San Mateo Feed & Fuel Company and to H. E. Casey & Company, was the value of all the property you had sufficient, at its fair market value, to pay all the debts that you had?

"A. No, sir.

"Mr. Mullin: To which I object, if it please the Court. There is no showing that payments were made to H. E. Casey & Company.

"The Referee: Subject to connectiong it, the objection is overruled.

"Mr. Margolis: No payments made?

(Testimony of Joseph L. Scardino.)

"The Referee: Yes. He claims that the man was not even up to try to collect.

"Mr. Margolis: There is testimony here in the record already that these moneys were received.

"The Referee: I understand that, and the objection is overruled, subject to your connecting it. Now, you can connect it by prior testimony or subsequent testimony.

"Mr. Margolis: I do not understand that I have to go over the testimony heretofore offered.

"The Referee: I am saying right now, you can connect [129] it by prior testimony or subsequent testimony. If you are satisfied with the record as it stands, then it will be up to me to determine whether or not it is correct.

"(Question and answer read.)

"Mr. Margolis: Q. You recall testifying at the prior hearings we had that moneys were paid to H. E. Casey & Company and to the San Mateo Feed & Fuel Company from the General Contractors. Do you recall that?

"The Witness: A. Yes, sir.

"Q. Moneys paid between December 29, 1941 and April 29 of 1942? A. Yes.

"Q. Do you recall testifying to that?

"A. That is right.

"Q. Do you recall testifying that demands were made by H. E. Casey & Co. and San Mateo Feed & Fuel Company of your General Contractors to make checks payable, not alone to you, but to them and to you? Do you remember that?

(Testimony of Joseph L. Scardino.)

"A. Yes.

"Q. Now, on any of the dates during the period between December 29, 1941 and April 29, of 1942, was the sum total of all the property you had, exclusive of the payments which were made to Casey & Company and San Mateo Feed & Fuel, sufficient to pay all of your then liabilities?

"A. No, sir.

"Mr. Margolis: You may cross examine.

"Cross Examination

"Mr. Hoffmann: Q. Mr. Scardino, you say that between December and April the San Mateo Feed & Fuel Company and the Casey Company asked you to make checks payable jointly to themselves? That is, that your debtor make checks payable to San Mateo Feed & Fuel Company and yourself?

"A. I signed an assignment, according to the last time the check was made to them. [130]

"Q. All right. Your response to the question of your counsel here is, that between December, 1941 and the date you went into bankruptcy in 1942, the San Mateo Feed & Fuel Company, for one, asked that the checks drawn for work that you had done be made payable jointly to themselves and you. Is that correct?

"A. I don't know, because they were made long before.

"Q. Sure. They had been made like that for three or four years before, hadn't they?

"A. No, no.

(Testimony of Joseph L. Scardino.)

"Q. You testified earlier they were made like that in 1940 and 1941? A. What?

"Q. Joint checks?

"A. The checks was made, I don't remember when it started jointly, because they went to the General Contractors and told them to make the check jointly.

"Q. When did they do that?

"A. I don't know. Ask them.

"Q. They had been doing it for a period of three or four years, hadn't they?

"A. No, it was lately.

"Q. They had been doing it in 1941?

"A. Yes.

"Q. Hadn't they?

"A. Not all; not all the General Contractors, several; one on the Schmidt, one on the Young, one on another one. They told them don't make checks for the first payment to me; make joint.

"Q. That had been going on for a year or so before?

"A. No, not a year before; probably four months, six months, five months, whatever it was.

"Q. Is it not the fact that Conway & Culligan started doing business with you that way in 1937?

"A. Conway & Culligan is separate, because all Conway & Culligan checks, he was operating on that line without anybody asking.

"Q. And had been since 1937? [131]

"A. He was doing it all the time. Not just with me, but every one of the sub-contractors.

(Testimony of Joseph L. Scardino.)

"Q. You never objected to that way of doing business? A. Yes, I did.

"Q. To whom?

"A. Well, I told to the manager and collector they should not do, because they spoil my business, I get no credit from those general contractors any more.

"Q. Did you ever make an objection to Mr. Culligan of that firm?

"A. I don't remember. Before I started business, they told me they would not make checks any other way. That settled it.

"Q. You know Mr. Culligan?

"A. Absolutely.

"Q. Do you see him here today?

"A. Yes, he is here.

"Q. Now, you have alleged in the affidavit here, Mr. Scardino, that you ceased doing work the latter part of January, 1942. Is that correct?

"A. That is right.

"Q. You obtained materials from the San Mateo Feed & Fuel Company up until the middle of February?

"A. I buy material until maybe two days, three days, before I quit.

"Q. You bought materials as late as February 12th from the San Mateo Feed & Fuel Company?

"A. Yes, I think that is the last I bought.

"Q. Then, you did not quit the latter part of January, did you?

"A. I didn't say January; I said February.

(Testimony of Joseph L. Scardino.)

"Q. The affidavit says January. Is that correct?

"A. I told you it was the 10th to 15th.

"Q. I am not asking what you told me. I am asking if the affidavit you swore to as correct, was correct? [132]

"A. Maybe I didn't read it. Maybe I overlooked that. When I quit business was in 1942, in February.

"Q. Now, this Bud Moore that you spoke of, you know Mr. DaMonte, don't you? A. Yes.

"Q. Who is Mr. Damonte?

"A. I think, if I am not mistaken, he is the fellow sitting there.

"Q. At that time he was credit manager for San Mateo Feed & Fuel Company?

"A. That is right.

"Q. So far as bills were concerned, your dealings were with him? A. That is right.

"Mr. Hoffmann: That is all.

"A. But, Mr. Moore was coming down, because I did the business with him. He told me if I did not pay the money, he would be kicked out of the job.

"Q. You knew who the credit manager was, didn't you? A. He used to come too.

"Mr. Margolis: Just a minute. I think that is argumentative.

"The Referee: He may answer.

"Mr. Hoffmann: Q. You knew Mr. Damonte?

"A. Mr. Damonte used to come with Bud Moore a couple of times to collect the money.

(Testimony of Joseph L. Scardino.)

"Q. Do you know where Bud Moore is today?

"A. I don't know. I know where he lives, but I don't know if he is there.

"Q. You don't happen to know that he is in the service? A. I don't know.

"Mr. Mullin: Q. Mr. Scardino, you started doing work for Conway & Culligan in 1937, didn't you?

"A. I could not remember exactly when he started the work. I did the work in San Mateo, when he was down in East San Mateo and I was doing work until——

"Q. You know he had a subdivision in San Mateo south of the highway?

"A. That is right. [133]

"Q. Known as Hayward Park?

"A. That is right.

"Q. When Conway & Culligan started developing that, you started doing the contracting work for him on plastering? A. Yes.

"Q. When they completed that subdivision, they went to another subdivision known as Elmwood?

"A. That is right.

"Q. That is on El Camino Real, in South San Mateo? A. Yes, sir.

"Q. You worked there, did plastering for them?

"A. Yes.

"Q. From there you went to the new subdivision in Burlingame, known as Burlingame——

"A. Village.

"Q. That is right. And you did work there?

(Testimony of Joseph L. Scardino.)

"A. That is right.

"Q. You did all the work there for them in those subdivisions, or at least, a great deal of plastering? A. Yes.

"Q. Is it not correct that when you first started to work for Conway & Culligan, Mr. Culligan told you your checks would be made payable to you and the material men?

"A. That is right; he told me that.

"Q. And that procedure was followed through these three subdivisions, up to the time you stopped working? A. That is right.

"Q. Did you object to that procedure?

"A. Not to him.

"Q. Nor to Mr. Culligan? A. No.

"Q. Did you object to anyone in the firm of Conway & Culligan?

"A. I don't understand that.

"Q. Did you object to anyone that had anything to do with Conway & Culligan?

"A. Anyone that have to do with this job?

"The Referee: Q. Did you tell any other member of the [134] firm?

"A. Conway & Culligan?

"Q. Yes, that you objected?

"A. No, I never objected to nothing.

"Mr. Mullin: Q. Then, it was perfectly agreeable to you that the checks from their jobs be made jointly to you and whoever the material man was?

"A. With Conway & Culligan, yes.

"Q. During that time you bought materials

(Testimony of Joseph L. Scardino.)

from San Mateo Feed & Fuel and H. E. Casey & Company? A. Yes.

"Q. When you got those checks, you took them into the office of either San Mateo Feed & Fuel Company or H. E. Casey & Company, depending on who your material man was?

"A. That is right.

"Q. At that time there would be an adjustment of your account, for what you owed them on the job of Conway & Culligan? A. That is right.

"Q. You followed that procedure through the three subdivisions? A. That is right.

"Redirect Examination

"Mr. Margolis: Q. Were you supposed to get any portion of the original payment on the particular job, directly to you?

"A. On those jobs, Conway & Culligan used to give me one check for maybe three jobs, sometimes maybe just one job; it all depends; sometimes once a month, twice a month, all the work, whenever the payments are due. Probably they make it on one check for two jobs or more, whatever payments were due.

"Q. Were any of those payments to go directly to you alone on these jobs? A. No, no.

"Q. For your profit, or your own work, weren't you supposed to get the first payment for yourself, or the second [135] payment?

"A. The first payment I would get on jobs to me to pay labor probably. If there was a little pro-

(Testimony of Joseph L. Scardino.)

fit over labor, I kept it. The second check, we agree, were material men, to pay the material.

"The Referee: Q. The second check?

"A. The second check.

"Mr. Margolis: Q. You did that in every instance?

"A. I did that with Conway & Culligan until I finished.

"Q. There were some jobs where you did not get that additional check made jointly by the general contractor to the material man and yourself?

"A. On Conway & Culligan?

"Q. Or any?

"A. Conway & Culligan made the first check and second check both was made joint.

"Q. Yes?

"A. When I got the first check, they have to endorse the check and give to me.

"Q. Did they do that, or send it to the material man?

"A. No, they gave to me, Conway & Culligan, and I bring it to the material man. I could not say, maybe a couple of times they did send it to the office, and they have to bring it to me to sign.

"Q. Did they give you any portion of those checks, or ask you to give them the whole check?

"A. San Mateo Feed & Fuel and Casey & Company wanted me to pay the labor. If there was any money left over, they used to give me a refund. If there was not enough, I go on to another job. If I had money in my pocket, I used to pay. But

(Testimony of Joseph L. Scardino.)

one time, Mr. Casey absolutely refused to sign the check.

"Q. Drawn payable to you?

"A. They always sent the check, and it was the first payment on the job, and I used up against it to pay my labor. And there was another fellow that was credit manager—— [136]

"Mr. Mullin: May we have the date, approximately, on this? When did this happen?

"A. This happened, I believe it was 1941; it was in the summer time. I cannot say the date when it was.

"Mr. Mullin: I move to strike it, Your Honor. It has no bearing on this particular issue, not being within the period.

"Re-cross Examination

"Mr. Mullin: Q. Mr. Scardino, in your type of business, you put on the first coat of plaster. That is known as the 'brown coat'. Is that right?

"A. Yes.

"Q. At that time you get a check for a percentage of whatever your bid was?

"A. That is right.

"Q. What was it? Forty or fifty?

"A. Sixty per cent.

"Q. Sixty per cent on the brown coat?

"A. That is it.

"Q. That check came to you and from that check you paid your bills for the various mechanics you had on the job, your men, your labor claims?

"A. That is right.

(Testimony of Joseph L. Scardino.)

"Q. When you completed the job and gave it the final coat, the check was issued to you by Conway & Gulligan for the difference between the first check and the contract price?

"A. That is right.

"Q. And that check would be made payable jointly to you and San Mateo Feed & Fuel, or to you and H. E. Casey & Company, depending on who gave you the material? A. Yes.

"Q. Now, Conway & Culligan—each house built had a number, didn't it? A. That is right.

"Q. You kept your books; your bid on No. 87 would be so many dollars, for example?

"A. Yes.

"Q. In their books, each house had a number?

"A. Yes.

"Q. When you would bring this check into San Mateo Feed & Fuel or Casey & Company—when you bought your material from them, you told them this particular material was going to job 87 for example, to bill it to this job, or that job?

"A. It was right on the job. [137]

"Q. When you bought your material, you told them to deliver it to job 87 or 68, or whatever it happened to be? A. Yes.

"Q. They kept their books, had an account of how much material was supplied on job 87, job 46, whatever it was. When you brought in the final check to Casey & Company or San Mateo Feed & Fuel, they took out the amount due them for ma-

(Testimony of Joseph L. Scardino.)

terials for that particular job the check covered. Is that right? A. Yes.

"Q. And anything over, they gave to you, either in a check of in cash. Is that right? A. Yes.

"Q. Or, if you had enough money at that time, you would tell them to put it on another job, credit your account on something else. Is that right?

"A. Yes.

"Q. That procedure followed right along?

"A. Yes.

"Q. That followed until the time you quit work?

"A. Until I quit work.

"Redirect Examination

"Mr. Margolis: Q. You told us a minute ago, Mr. Scardino, that some of these first checks, Casey & Company refused to endorse? A. Yes.

"Mr. Mullin: May we have the time on that, Counsel?

"Mr. Margolis: I am going to lead up to it; this is just preliminary.

"Q. You have listed in your schedules, certain wage claims, certain people you owe money for wages. Is that correct?

"A. Well, it was the men working for me.

"Q. That is right. The workmen?

"A. Yes.

"Q. Now, can you tell us when Casey & Company refused to sign these first checks for your 40%, or whatever the percentage was? [138]

"A. It was in 1941. I would say around October, November, I could not say exactly.

(Testimony of Joseph L. Scardino.)

"Mr. Hoffman: It is all immaterial.

"Mr. Margolis: Just a minute. After I lead up to the non-payment of these wage claims, I will take him from that point to the month it occured again.

"Mr. Hoffman: Wait a minute. If it was 1941, even if they practically extorted the money from him, it is immaterial.

"Mr. Margolis: December, 1941, Your Honor.

"Mr. Mullin: This was October or November.

"Mr. Margolis: Q. The refusal of Casey & Co. took place about October or November, 1941. Did you have a somewhat similar instance when you went to get a check?

"Mr. Hoffman: We further object on the ground that it is not binding on the San Mateo Feed & Fuel Company.

"The Witness: A. That time the credit manager was not there. They said they could not sign.

"The Referee: Q. When was that?

"A. Late 1941.

"Q. What do you mean by late 1941?

"A. Around November, October. The last of October or first of November.

"Mr. Mullin: I move to strike that, on behalf of H. E. Casey & Company.

"The Referee: It may go out, so far as October and November are concerned.

"Mr. Pardini: Wouldn't it be subject to showing what became of the check?

"The Referee: No, it would not be.

(Testimony of Joseph L. Scardino.)

"Mr. Pardini: That the check was not cashed? Apparently it was not collected until February, 1942.

"The Referee: Show that it was.

"Mr. Pardini: I don't know what counsel has in mind.

"The Referee: They are entitled to the objection, just the same. [139]

"Mr. Margolis: Q. Were there any of those instances that took place after December, 1941? Do you recall any instance of their refusal to turn over the first check to you in December, or January?

"The Witness: A. Mr. Casey was in the office himself one time. He says: 'Joe, we got to have money; you got to make a payment.'

"Mr. Mullin: May we have the time of this?

"The Referee: Yes. When was it?

"A. January, two or three weeks before I quit. I said: 'Mr. Casey, I ain't got money.' I say: 'As soon as I collect, all the money you get.' The same with the San Mateo Feed & Fuel.

"Mr. Hoffman: Just a minute. Who did you see in the San Mateo Feed & Fuel Company?

"A. The credit manager.

"Q. Mr. Damonte?

"A. Mr. Damonte. I told him.

"Q. This testimony of yours, the checks were made jointly to yourself, that you are talking about, and Casey & Company. Does that apply to the San

(Testimony of Joseph L. Scardino.)

Mateo Feed & Fuel Company. Did they refuse to cash them?

"A. No, San Mateo Feed & Fuel did not refuse. They complained they had to have money. In other words, no more material. Mr. Moore used to tell me he used to come sometimes with Mr. Damonte, and say they got to have money; they cannot do business like that.

"Mr. Hoffman: I move to strike it as not responsive.

"Mr. Margolis: I think it was.

"Mr. Hoffman: The question was, if the San Mateo Feed & Fuel Company refused to cash the checks. Then he goes on rambling.

"The Referee: I think you are right. It may be stricken.

"Mr. Margolis: He said they made demands for other money, not made jointly. [140]

"The Referee: But, he did not say they refused about signing the checks. That was the question.

"Mr. Margolis: Q. Were any payments supposed to come to you to pay the laborors?

"The Witness: A. Yes.

"Q. Directed to San Mateo Feed & Fuel Company, or made payable to San Mateo Feed & Fuel Company and yourself, in the latter part of January or February?

"Mr. Hoffman: Just a minute, if Your Honor please, the question as stated, assumes a fact not in evidence. That is this: 'Any payments supposed to be given you for the payment of laborors.'

(Testimony of Joseph L. Scardino.)

The man's testimony is that 60% was paid directly to him, with which he paid the laborers; the balance, 40% was made jointly, from which materials were to be paid.

"Mr. Mullin: I join in the same objection.

"The Referee: Read the question.

"(Question read)

"The Referee: What is the objection?

"Mr. Hoffman: That it assumes a fact not in evidence, the very general statement. The objection is this: The way the question is framed—'Were any of the checks made payable to you, for which you were supposed to pay the laborers, were any payments made payable to San Mateo Feed & Fuel Company and yourself?' The fact not in evidence, assumed in the question is: That any checks with which he was supposed to pay laborers were made jointly to anyone. The testimony already is definitely to the fact that with Conway & Culligan, at least, he received in his own name, not the joint names, 60% of the contract price and his testimony is that from the 60%, he paid the laborers.

"The Referee: I did not so understand him.

"Mr. Mullin: That is my understanding; that the first check was made payable directly to him and the final payment jointly. [141]

"The Referee: Let's find out.

"Mr. Margolis: Q. What was your statement?

"The Witness: A. As I said before, all the

(Testimony of Joseph L. Scardino.)

checks that came from Conway & Culligan, if it was for ten or one job, always were made jointly, from first to last.

"The Referee: What about the San Mateo Feed & Fuel Company?

"A. Well, the check came from Conway & Culligan.

"Q. You see, there are two accounts here?

"A. They used to make them the same way.

"Mr. Margolis: Q. To San Mateo Feed & Fuel?

"A. The same thing.

"The Referee: Q. All checks?

"A. All checks Conway & Culligan make to me or other subcontractors, they make like that. They used to operate business that way.

"Mr. Margolis: Q. Always you had to take those checks, you either took them yourself or mailed them, to San Mateo Feed & Fuel Company and H. E. Casey & Company? A. Yes.

"Q. Were you always able to get their endorsements of these so-called 60% that was mentioned here? Were you able to get them endorsed back to you, in other words?

"Mr. Mullin: To which we object unless the time is specified.

"The Referee: It must be subsequent to December 29th.

"Mr. Margolis: That is the time I am referring to, Your Honor.

"The Referee: I know, but that is not your question.

(Testimony of Joseph L. Scardino.)

"Mr. Hoffman: I think it would save confusion if you would designate San Mateo Feed & Fuel Company and H. E. Casey & Company separately.

"Mr. Margolis: He just stated they were handled the [142] same way, Counsel. At least one contractor, Conway & Culligan, made their checks payable jointly to himself and both San Mateo Feed & Fuel Company and H. E. Casey & Company.

"Mr. Hoffman: We have gotten some confusion here. But, originally, I think the witness testified that in October or November, Casey & Company refused to endorse a check. Counsel, then, was going to tie that in to a period within four months of the bankruptcy. I interposed an objection, whether or not the same thing applied to San Mateo Feed & Fuel Company, whether or not they ever refused to endorse a check, and we have gotten pretty far afield from that.

"Mr. Margolis: Q. Bearing in mind the four months' period prior to the filing of your petition in bankruptcy, do you have that in mind, Mr. Scardino?

"The Referee: Why not give him the date? December 29th, isn't it?

"Mr. Margolis: Q. December 29, 1941 is the commencement of the four months' period. You filed the petition and schedules on April 29, 1942.

"The Witness: A. Yes.

"Q. Now, at any time within that period, did you receive checks made payable from the general contractors, whether it was Conway & Culligan or

(Testimony of Joseph L. Scardino.)

any other general contractor, made payable to yourself and the two respondents here, different checks, payable to San Mateo Feed & Fuel Company and Joseph Scardino, or H. E. Casey & Company and Joseph Scardino? You received checks like that, did you?

"A. The last check I received from them was January 29th, under a week before a quit, the last week I quit, and I received no last payments; it was made joint. After that I did not receive no more money, because I signed the assignments to them and left them collect all accounts coming to me. [143]

"Q. The last check received, what happened to that?

"A. I paid some of the labor. I owed three weeks wages. What I had, I gave to them.

"Q. Now, your schedules show you owed laborers some money at the time you filed the petition?

"A. Yes.

"Mr. Hoffman: That is not binding on the Respondents, if Your Honor please, that line of questioning. The question is whether or not they received a preference here. Naturally, he owed some bills or he would not be here, whether they are labor cliams or anything else. I object to that line of questioning on the ground that it is irrelevant, incompetent and immaterial.

"Mr. Margolis: I am trying to lay the foundation without putting words in the witness's mouth.

"Mr. Mullin: In addition, Your Honor, I ob-

(Testimony of Joseph L. Scardino.)

ject to any transaction had with anyone else outside of Conway & Culligan. What he did with any other general contractor, we are not interested in.

"The Referee: He would have to show he had other creditors or it could not be a voidable preference if they did receive it.

"Mr. Hoffman: The schedules speak for that.

"The Referee: Are you willing to rest on the schedules? You are not objecting to them?

"Mr. Hoffman: The only thing I am objecting to on the schedule is, we were not named.

"Mr. Margolis: I think the answer made by the witness, made in the affidavit and during several hearings we had, I think the record will show his testimony in that regard. He believed, by virtue of these payments, whether you call them assignment, preference or what, the moneys they received from Conway & Culligan and other general contractors, he believed they were paid and so told his attorney. That is the reason you are not listed. That is the testimony. [144]

"The Referee: I know. That is not material. The only thing here is, first, the four months' period.

"Mr. Margolis: Yes.

"The Referee: Secondly, the fact that he has other creditors of the same class.

"Mr. Margolis: That is true.

"The Referee: All right. And that they received payments, knowing or having reason to believe that it would give them a preference over the other creditors.

(Testimony of Joseph L. Scardino.)

"Mr. Margolis: Mr. Hoffman, Your Honor, stated a moment ago that his client is not named in the schedule.

"Mr. Hoffman: I was kidding.

"Mr. Margolis: Maybe I misunderstood. You asked a question, whether they had an objection to the schedules. We offered them before; Your Honor said it was not necessary.

"The Referee: They are before the Court. The only thing I want to know, at the time you claim this payment was made, that he owed other people, at that time.

"Mr. Mullin: And that these Respondents knew he owed other people on other jobs.

"The Referee: No, they would not have to know that.

"Mr. Mullin: You are leading up to insolvency.

"The Referee: He has already testified to that, so far as the record is concerned, at the present time.

"Mr. Hoffman: I think, Your Honor, we should narrow the issues here. We have had a complete hearing here regarding the question of insolvency, knowledge, and so forth. Now, subsequent to that hearing, a petition was filed and there were four points enumerated upon which counsel wanted to introduce new evidence. I rather assumed, in that it was enumerated there, that this hearing would be confined to the four issues. In support of that, he filed an affidavit here by Mr. Scardino. I don't see any reason for having a complete rehearing, as long as he has enumerated the issues himself. [145]

(Testimony of Joseph L. Scardino.)

Now, the issues enumerated by counsel are:

"1. That within four months of the filing of Bankrupt's petition herein, and more particularly between December 30, 1941, and the date upon which he filed said petition, April 29, 1942, and upon each and every intervening day, the aggregate of all Bankrupt's property, exclusive of the total sums conveyed by him to the Respondents herein, was not, at a fair valuation thereof, sufficient to pay his debts.

"He asked him that and the witness said it was not.

"2. That Respondents actually knew Bankrupt's financial condition was such that in January, 1942, he was compelled to and did close his business and had no money or property with which to pay all of his outstanding debts; that this condition existed not only at the time of the closing of the same, but also thereafter up to and including April 29, 1942.

"He says in the affidavit it was the fact. We cross examined him as to whether or not it was the fact and he was mistaken; it was closed about the middle of February.

"3. That Respondents had reasonable cause to believe Bankrupt was insolvent within the meaning of the Bankruptcy Act, at the times they received said payments.

"4. That by the very manner in which Respondents obtained the preferential payments, and their activities leading up to their acquiring said pay-

(Testimony of Joseph L. Scardino.)

ments, Respondents knew they were obtaining preferences.

"Those are the matters on which we brought our proof today. I think we are entitled to have the evidence confined to those issues.

"The Referee: I think you are.

"Mr. Margolis: That is correct, but these gentlemen have taken the witness on cross examination. As I look at it, my redirect now is somewhat in answer to their cross. That is what led to this far afield condition. [146]

"The Referee: Does it help us any? Haven't we certain facts to prove?

"Mr. Margolis: We will offer the affidavit in evidence, Your Honor, and let it go at that. I think the schedules are before the Court and show the creditors. I think Your Honor asked the question, whether the debts pending at that time—I will ask him the question if it will help the situation:

"Q. The claims you set forth, the unsecured:

"State Compensation Ins. Fund; Industrial Indemnity Co., two items here; Blake-Moffit-Towne Paper Co.; Markus Cut-Rate Hardware; Frank Peri and Sequoia Grocery Market, totalling the sum of $1,858.22, were those owing on or about December 29, 1941? You owed those people at that time? A. Yes.

"Q. On one claim, $74.80, of Industrial Indemnity Co., I notice you have the date, 11/6 to 12/6-41? A. Yes.

"Q. Then the other claim of the Industrial In-

(Testimony of Joseph L. Scardino.)

demnity Co. which goes from 12/6/41 to 1/6/42 is in the amount of $59? A. Yes.

"Q. Those other claims, State Compensation Ins. Fund $344.30, Blake-Moffit-Towne Paper Co., $74.00, Markus Cut-Rate Hardware, Oakland, $331.00, Frank Peri $900.00, Sequoia Grocery Market, Redwood City $75.00. Did you owe those bills on or about December 29, 1941? A. Yes, sir.

"Q. Did you owe these laborers approximately the amounts set out under Schedule A (1):

"Clarence G. Deals, $47; T. Purcelli, $55.50; H. Carlson, $63; H. Hampton, $51; Don O'Leary $98; George Leith $63; T. Cacano $111; Joe Reginato $111; Joe Chiri $120; T. Spoon $51. Did you owe those amounts at or about December 29, 1941?

"A. Yes, I did. [147]

"Q. Did you pay these creditors whom I have enumerated?

"A. No, I did not have much money. I used to keep that money. I still owe that money since that time, their quitting time, because I did not have enough, so I carry it, see, when I cannot pay any more.

"Q. In other words, you paid a little on the current work? A. Yes.

"Q. But not on the past? A. Yes.

"Mr. Mullin: Have you finished, counsel? I have not completed.

"Mr. Margolis: Go right ahead.

"Re-Cross Examination

"Mr. Mullin: Q. Mr. Scardino, you said Mr.

(Testimony of Joseph L. Scardino.)

Casey refused to endorse checks. Was it Mr. Casey, or the credit manager, Mr. Mindnich?

"A. I went there and Mendich first told me he cannot endorse the check; he is only the credit manager.

"Q. Did you go to see Mr. Casey?

"A. I go to see Mr. Casey.

"Q. How many times did that happen, Joe?

"A. Twice.

"Q. When did it happen?

"A. Just a short while ago. I cannot remember the time. Maybe three months before; one a couple of months after. But, finally, I had to phone later for it.

"Q. Just a minute.

"Mr. Margolis: Let him make the explanation.

"A. I had to phone later to have the check signed.

"Mr. Mullin: Q. There were two occasions, you say?

"A. Yes.

"Q. Were those the two occasions referred to in your previous answer as October and November, 1941? A. Yes.

"Q. Those were the same occasions?

"A. Was one around October and one a long time before.

"Q. And the other was October, 1941. Is that right? [148] A. Yes.

"Q. Now, Joe, you said the credit man came to see you about collecting some of these bills?

(Testimony of Joseph L. Scardino.)

"A. That is right.

"Q. You told him as soon as you collected, you will pay. Is that right? A. That is right.

"Q. What were you referring to, as soon as you collected? Collected what?

"A. From the general contractor, the second payments.

"Q. And that was whom; who was the general contractor?

"A. Well, I had a dozen, a dozen and a half. I could not say which.

"Q. Pardon me?

"A. Well, there was Schmidt. In fact, he check up with Schmidt, how much he owed me.

"Mr. Pardini: Q. By 'he', you mean the credit manager?

"A. Yes, the credit manager came down and went to the general contractor, how much he owed.

"Mr. Mullin: Q. How many general contractors are you talking of this time?

"A. I would say about twelve.

"Q. Who were they?

"A. I think the attorney has a record. Conway & Culligan was one; Gus Johnson is two; Stanley Younger; Schmidt; Donald Johnson. There is a lot I cannot remember. Some general contractors I cannot remember. I had about a dozen.

"Q. And at this time you had money due from all those people to you for all those various jobs you were working on? A. That is right.

"Q. So, when you told them: 'As soon as I can

(Testimony of Joseph L. Scardino.)

collect, I will pay you', you had in mind that you had funds coming from the dozen general contractors? A. That is right.

"Q. And, at that time, would the amount of money you had coming from this dozen general contractors be enough to pay what you owed for materials to these creditors?

"A. I don't know. [149]

"Mr. Pardini: What time are you referring to?

"Mr. Mullin: I am referring to the same time he is referring to.

"Mr. Pardini: Well, I don't know.

"The Witness: A. I don't know.

"Mr. Mullin: Q. You had money coming from these people?

"A. I had money coming from the second payment, which we counted that the second payment would be enough to pay the materials.

"Q. Ordinarily, Joe, 40%, or the second payment, would be enough to pay the material bills and give you some for your profit for the job, wouldn't it? A. Maybe; maybe not.

"Mr. Pardini: Just a minute. That calls for speculation.

"The Witness: Maybe; maybe not.

"Mr. Mullin: I said, ordinarily.

"The Referee: He has answered your question.

"The Witness: Well, ordinarily.

"Mr. Pardini: I submit the question has been asked and answered.

"Mr. Mullin: Q. I will ask this: Which would

(Testimony of Joseph L. Scardino.)

it be? Would it be 'maybe' more times than 'maybe not'?

"Mr. Margolis: Just a minute. I object to the question on the ground that it has been asked and answered.

"Mr. Mullin: If you will show me where it was asked and answered——

"Mr. Pardini: I make the objection that it is speculative and it does not fix the time. I can answer you: Apparently it did not.

"Mr. Mullin: Who is testifying, you or your client?

"Mr. Margolis: The objection is before the Court.

"Mr. Pardini: The objection is that it is speculative and does not fix the time and place when 'maybe' and 'maybe not'. [150]

"The Referee: Can't a man, on cross examination, be asked for his conclusion?

"Mr. Pardini: Maybe he can. It is already asked and answered any way.

"The Referee: Not this question.

"Mr. Margolis: I object on the ground that it has been asked and answered.

"The Referee: Not this question; there is no answer.

"Mr. Mullin: Q. Do you remember the question?

"The Witness: A. You asked me if the 40% wasn't enough to pay the material.

"Q. The first question I asked you was if ordinarily it exceeded that. Your answer was, maybe;

(Testimony of Joseph L. Scardino.)

maybe not. A. That is right.

"Q. And I asked you which would prevail; would it be more maybes or more maybe nots?

"A. Maybe nots.

"Q. Now, Joe, where are you working now?

"A. In the city here.

"Q. For whom? A. Myself.

"Q. Now, when you closed down your business, about February, 1942—that is when you closed, is it not? A. That is right.

"Q. You have in your affidavit that it was a month earlier, but it was February, wasn't it?

"A. Yes.

"Q. Where did you go to work?

"A. The Southern Pacific Shop.

"Q. At that time there were some unfinished jobs? A. That is right.

"Q. And is it not the fact that you told Mr. Thomas Culligan of Conway & Culligan you were giving up the plastering business, because you could make more money working for the S. P. Company?

"A. No.

"Q. You did not tell him that? [151]

"A. I told him I cannot operate my business no more; I am broke; I quit. After about two weeks he wrote me a letter concerning he wants to finish those jobs.

"Q. Have you the letter now?

"A. No. I went in the office.

"Q. He did not write you a letter, then?

"A. Conway & Culligan wrote me a letter with

(Testimony of Joseph L. Scardino.)

the fact, if I would give clearance so he could get somebody else to finish the job.

"Q. Have you that letter now?

"A. I have not; no.

"Q. Do you know where it is? A. No.

"Q. Is that one of the things the dog got away with?

"A. That is right. So, I went to the office and told Mr. Conway and Culligan to get somebody to finish.

"Redirect Examination

"Mr. Pardini: Q. In November or December, 1941, the State of California sued and attached your money in the San Mateo branch of the Bank of America?

"Mr. Mullin: Let's get the date within the four months period.

"Mr. Hoffman: It is immaterial anyway.

"Mr. Pardini: I will ask you: On December 29, 1941, was a small amount in the San Mateo branch of the Bank of America attached by the State of California?

"Mr. Hoffman: I still object to it as immaterial.

"The Referee: It is immaterial.

"Mr. Pardini: I don't know whether the man knew about it.

"The Referee: Suppose he did know there was an attachment or there wasn't an attachment?

"Mr. Pardini: If a man cannot satisfy an attachment for $50——

"Mr. Mullin: Wait a minute. It is an attachment. If [152] it please the Court, still in this country, we are entitled to a trial.

(Testimony of Joseph L. Scardino.)

"Mr. Hoffman: It is not binding; not within the issues.

"The Referee: I think the objection is good.

"Mr. Pardini: Q. I might ask the same question: On April 20, 1942, was there money executed upon by the sheriff of the County of San Mateo, standing in a bank account in your name at the San Mateo branch of the Bank of America?

"Mr. Mullin: To which we object on the ground that it is incompetent, irrelevant and immaterial, not within the issues, and not binding on these Respondents.

"The Referee: What does that go to prove?

"Mr. Pardini: During all this time, here is an attachment unsatisfied.

"Mr. Mullin: So what?

"Mr. Margolis: I think counsel has in mind that it is set out by affiant in the affidavit that the only property he had was $50 at the time he filed, which was subject to attachment.

"The Referee: That is not disputed. But, anything so far as the affidavit stands.

"Mr. Pardini: The objection is sustained to both those?

"The Referee: Yes.

"Mr. Pardini: Q. The change in the method of collecting the money occurred in January or February of 1942?

"Mr. Mullin: What are you referring to?

"Mr. Pardini: Q. In the case of both creditors, both Casey and the San Mateo Feed & Fuel, these

(Testimony of Joseph L. Scardino.)

papers you signed, you never had signed papers like that before, had you?

"Mr. Hoffman: Just a minute, please. Mr. Scardini, as Your Honor has probably observed, will answer yes to anything. The question is leading, suggestive, assuming a fact, stating a fact directly contrary to his testimony here. [153]

"The Referee: He just testified now, on cross examination by Mr. Mullin, that all this happened back in 1941.

"Mr. Pardini: I am not referring to that at all, if the Court please. I am referring to the acts in January and February and within the four months' period.

"Mr. Hoffman: What acts?

"Mr. Pardini: This man not signing the joint checks, I am not concerned with that at all. As I understand, there were other matters signed, which he mentioned on direct or cross examination. They came up and got some papers to be presented to the contractors, these two Respondents.

"The Referee: That was after he had gone out of business, as I understood. They got a release so they could get somebody else to do the work.

"Mr. Pardini: No, something else before that. That is regarding the letter asking him to come to the office and give a release so somebody could complete the job.

"The Referee: Yes.

"Mr. Pardini: But, moneys were collected between December 29 and April 29, substantial sums,

(Testimony of Joseph L. Scardino.)

shown by the accounts introduced in evidence, and those collection, I believe it is intimated in the testimony now, were collected pursuant to another document. The payment made from Conway & Culligan was the custom of the trade, apparently; they did that with each sub-contractor, to protect the material men. There was a subsequent execution of something else, within the four months' period, in favor of these two Respondents.

"The Referee: Will you point it out in the evidence? I remember the other testimony that was given here, which, of course, I will have to keep in mind, but I did not hear him testify to that today.

"Mr. Pardini: I think I can remember it.

"The Referee: Now? On the examination of him? [154]

"Mr. Pardini: On the examination, I think, of Judge Mullin.

"Mr. Hoffman: What he testified to was, after he went through bankruptcy, Conway & Culligan wrote him a letter.

"Mr. Pardini: He testified as to a certain assignment. He used that word.

"The Referee: Let's not argue about it. Let the reporter go back to Judge Mullin's examination and see if she can find it.

"(Question and answer read as follows:

Cross Examination: Mr. Hoffman: Q. Mr. Scardino, you say that between December and April the San Mateo Feed & Fuel Company

(Testimony of Joseph L. Scardino.)

and the Casey Company asked you to make checks payable jointly to themselves? That is, that your debtor make checks payable to San Mateo Feed & Fuel Company and yourself?

A. I signed an assignement, according to the last time the check was made to them.)

"The Referee: That was in response to Mr. Hoffman.

"Mr. Pardini: Counsel for the trustee now states that was already gone into on the previous hearing and there is testimony in the record.

"The Referee: Very well.

"Mr. Pardini: I understand that all the previous testimony in the matter is before the Court?

"The Referee: Yes. This is a further hearing, not a new hearing.

"Mr. Margolis: If the questions of Mr. Pardini, the attorney for the bankrupt, are going to clarify it, I will not interpose an objection. I merely point that out.

"The Referee: I say, if he wants to go into it at this [155] time, it is part of redirect. Mr. Hoffman brought it out.

"Mr. Pardini: Q. In other words, there was a change by one of the creditors that had been receiving joint checks. From then on, they got straight checks after the assignment in evidence was executed by you and sent to the contractor?

"The Witness: A. That is right.

"Mr. Hoffman: You are referring to Trustee's 'A' for Identification?

(Testimony of Joseph L. Scardino.)

"Mr. Pardini: Yes. One is Trustee's 'A' for Identification and also Trustee's Exhibit No. 1 in evidence. That refers to San Mateo Feed & Fuel Company, and H. E. Casey & Company, and Frank Peri.

"Q. That is what you are referring to, isn't it?

"Mr. Hoffman: I object to that question.

"The Witness: A. At the time I quit, I didn't have anything to collect. After, that bill was coming to me.

"Mr. Margolis: Q. The claim of Frank Peri was for labor, was it?

"A. Labor.

"Q. He was not paid in full, was he?

"A. No.

"Mr. Mullin: Who?

"Mr. Margolis: Peri.

"That is all.

"(Witness excused).

"The Referee: Do you desire any further testimony?

"Mr. Margolis: That is all, Your Honor. The Trustee rests.

"Trustee rests.

"(Recess).

"The Referee: Call your next witness.

"THOMAS J. CULLIGAN, JR.

"Called for Respondents, sworn.

"Mr. Mullin: Q. What is your address, Mr. Culligan?

"A. Home, 1549 Nadina. [156]

"Q. That is San Mateo. Is that correct?

"A. San Mateo.

"Q. You are one of the owners of the firm of Conway & Culligan?

"A. It is a partnership.

"Q. You know the bankrupt here, Joseph Scardino? A. Yes.

"Mr. Mullin: This is preliminary, Judge.

"Q. He worked for you in 1937, doing plastering? A. Doing plastering.

"Q. Doing plastering work in Hayward Park, Elmwood and also Burlingame Village?

"A. Yes.

"Q. And in the payment to Mr. Scardino, there was a first and second payment. I believe the procedure was, after the brown coat, the payment was 60%? A. Sixty per cent.

"Q. Will you tell us whether or not checks for the first payment were made directly to Mr. Scardino or to Mr. Scardino and anyone else?

"A. The first payments were made to Mr. Scardino alone.

"Q. On all occasions?

"A. On all occasions.

"Q. The second payment?

"A. Made to Scardino and the material house where he bought the material.

(Testimony of Thomas J. Culligan, Jr.)

"Q. Dependent on whether it was Casey & Company or San Mateo Feed & Fuel Company?

"A. He would notify us.

"Q. That was followed from 1937 to the time he stopped work?

"A. That ran from the time he took the original contract.

"Q. Now, Mr. Scardino was acting for you as a sub-contractor in the early part of 1942?

"A. Yes.

"Q. In Burlingame Village?

"A. That is correct.

"Q. You had a number of jobs going on there; you were developing the entire tract?

"A. That is right.

"Q. Each house had a number? That is the system under which you operated?

"A. That is right.

"Q. He was operating there as your sub-contractor? A. That is right. [157]

"Q. Did Mr. Scardino at any time during January or February, 1942, fail to appear on the jobs as had been his custom previously, in the management and also the workmanship around the jobs?

"A. I never noticed any difference. Of course, he was doing jobs for other contractors. There would be days, weeks probably, I didn't see him.

"Q. Did he stop working for you?

"A. He stopped working for me?

"Q. Did he stop working for you?

"A. Yes, he stopped working.

"Q. About when, Mr. Culligan?

(Testimony of Thomas J. Culligan, Jr.)

"A. I think it was—if I recall, it was the latter part of February.

"Q. 1942? A. 1942.

"Q. Were there any mechanics left on the jobs?

"A. Yes, I think there were about five or six men working for him at that time.

"Q. I show you here, Mr. Culligan, Trustee's Exhibit No. 1; a letter purporting to be on your stationery, dated February 20, 1942, addressed to Conway & Culligan, reading:

> " 'You are hereby authorized to pay from any amounts due me for work on your jobs the monies or any part thereof due the following business firms:
>
> San Mateo Feed & Fuel Co.
> Frank Perry
> H. E. Casey Co.
>
> and all labor bills, and charge same to my acount.
>
> 'In consideration of your paying whatever monies is due me on the above accounts, I shall expect you to hold me harmless provided the statement I have rendered you is correct.
>
> (Signed) 'J. L. SCARDINO.
>
> 'Accepted:
>
> 'T. J. CULLIGAN, JR.
>
> 'Witness:
>
> 'J. C. MINDNICH.' [158]

(Testimony of Thomas J. Culligan, Jr.)

"A. That is right.

"Q. That is your signature there, T. J. Culligan, Jr.? A. It is.

"Q. That was signed by Mr. Scardino, was it?

"A. Yes.

"Q. On the date it bears?

"A. That is right.

"Q. Will you advise us as to the circumstances under which that was executed, please?

"A. Well, at this time, he told me he was going to quit business. He felt he should go into some sort of defense work, though primarily, he mentioned at that time the shipyards, but I understand he went into the Southern Pacific.

"Mr. Margolis: I object to what his understanding was.

"Mr. Mullin: It may go out.

"Mr. Margolis: He can merely testify as to the parties present, when it was.

"Mr. Mullin: It is already stipulated it may go out.

"Q. Now, what did he tell you, Mr. Culligan? Not what you thought; the conversation as you remember it?

"A. He told me he was going out of business.

"Q. And what, if anything, happened after that as between you and Mr. Scardino?

"A. What happened after that?

"Q. Yes? A. After this was signed?

"Q. After he told you he was going out of business. What if anything did you do?

(Testimony of Thomas J. Culligan, Jr.)

"A. Well, I got another contractor.

"Q. I see. To finish the work?

"A. In other words, maybe there were ten homes up there to the first coat of plaster; maybe some whitewashing to do, and so forth, which I had another contractor come and take over his contract.

"Q. Who prepared the instrument you hold in your hand, Trustee's Exhibit No. 1?

"A. I believe I did. [159]

"Q. Do you remember where that was executed, Mr. Culligan?

"A. If I recall, it was executed in Mr. Scardino's own home. I am not quite clear on that.

"Q. And did Mr. Scardino tell you why he was going out of business?

A. He said he could make more money working in defense work.

"Q. And at that time, February 20th of 1942, did your firm owe any money to Scardino?

"A. Yes.

"Q. For work which had been performed or in process of being completed?

"A. Yes, I think the final accounting at that time amounted to approximately $2000 balance due him on brown coat payments, or any balances of jobs that were completed.

"Q. You secured another contractor to complete the jobs?

"A. We secured another contractor to complete the jobs.

"Mr. Mullin: You may cross examine.

(Testimony of Thomas J. Culligan, Jr.)

"Cross Examination

"Mr. Margolis: Q. Who was present in Mr. Scardino's home when this was executed?

"A. If this was executed at his home, Mr. Mindnich. I remember the two of us drove to his home. I believe it was this document.

"Q. You are not positive?

"A. He signed some document, as I remember, at Joe's home.

"Q. Who is Mr. Mindnich?

"A. Mr. Mindnich was credit manager for H. E. Casey Co.

"Q. Who arranged for this, Mr. Scardino or Mr. Mindnich?

"A. I did. In other words, this was protection. If he was going out of business, I had to have a plasterer.

"Q. It was prepared after he told you he was going out of business?

"A. After he told me he was going out of business.

"Q. It was not prepared when Mr. Mindnich came to you and endeavored to ascertain how much your firm owed Scardino?

"A. No, this was done after. [160]

"Q. It was all done the same day?

"A. Yes, I think it was.

"Q. The conversation had with Mr. Scardino?

"A. That is right. We had spent two or three days trying to get in touch with Joe and could not quite contact him. We went down one afternoon,

(Testimony of Thomas J. Culligan, Jr.)

he happened to get home and explained the condition of this and said that was the best thing to do.

"Q. That day he told you he was going into defense work?

"A. That day he told me he was going into defense work, going to quit business.

"Q. What time of day or night?

"A. It was in the afternoon, as I recall, 2:30 or 3. We drove down after lunch.

"Q. That was prepared, you say, after he told you? A. Yes.

"Q. How many times did you see him that day, Mr. Culligan?

"A. I think it was twice.

"Q. In what other place did you see him?

"A. At the home. We drove to his home. He said he would wait for us until we prepared the document. We went down and came back, as I recall.

"Q. You did not take him to your office?

"A. No.

"Q. How far from your place of business?

"A. He lived at Redwood City. Our place of business was Burlingame, probably fifteen miles, I guess, about twenty minutes' drive.

"Q. Was any such document or similar document prepared with respect to any other money you owed him?

"A. This involved all the moneys.

"Q. That involved all?

"A. That is right.

(Testimony of Thomas J. Culligan, Jr.)

"Q. No other document was prepared, any document whatsoever?

"A. None that I recall. I think this was all.

[161]

"Q. You are quite positive about that?

"A. As to any other document?

"Q. Yes?

"A. If there was any other document, it was relative to this; it was the same thing. As I recall, this was the only document.

"Q. What is the date of that?

"A. That is February 20, 1942.

"Q. And the entire transaction was consummated on that date. Is that correct?

"A. Yes, as I recall, it was only that day I saw Joe. I don't recall seeing him any other time.

"Q. I show you Trustee's Exhibit 'A' for identification? A. Yes. That is right.

"Q. Have you seen any document like that, similar to it, or the original of the document you hold in your hand? A. No, I have not.

"Q. That is addressed to your firm?

"A. Yes, I see that it is.

"Q. To your attention?

"A. That is right. It may be that I have the original, but I don't recall it, in my file.

"Q. Do you recognize the handwriting of the figures there at all, Mr. Culligan?

"A. No, I don't. As being mine, you mean?

"Q. Whoever it is? A. No, I don't.

"Q. What is the date of the document?

(Testimony of Thomas J. Culligan, Jr.)

"A. February 18th.

"Q. Two days before this other document?

"A. Yes, this one here is the 20th.

"Q. You testified a minute ago that you paid him at once, or in due course, the 60% of the contract price on each of these jobs?

"A. Each job number. That would go automatically to him, the first payment, because the first payment involves the [162] lathing. He does the lathing. Other than his direct payroll, he probably subs that out. The first check would be direct to Scardino; the other 40% would be to Scardino and the other material men.

"Q. You kept a file on this job?

"A. We kept a complete file.

"Q. Have you the file with you? A. No.

"Q. Those are your job numbers on that?

"A. Those are job numbers. That is the way our jobs are always run.

"Q. Who else would have access to your file for the numbers of the jobs set out in Exhibit 'A'?

"A. Probably the material house would know. I would know it.

"Q. Would Scardino know it, do you know?

"A. Let's see. Yes, he would be bound to know it. If he ordered three barrels, he would know.

"Q. You don't know if that document ever reached your files, or your hands?

"A. No, I don't remember now. It must be. It is written to me, but I don't remember it.

(Testimony of Thomas J. Culligan, Jr.)

"Q. When did you last examine your file on the Scardino work before coming here this afternoon, Mr. Culligan?

"A. Oh, it was, I think, six or seven months ago. Somebody phoned me in San Francisco relative to this. I don't know if it was you; somebody asked us to give some information. That is the last time I looked at it.

"Q. The information is in your office down the Peninsula, not here. Is that correct?

"A. Yes, that is correct.

"Q. And you tell us now, you know the 60% was paid on each and every job?

"A. The first payment?

"Q. The first payment?

"A. Yes. That procedure went on day after day 60% of the total contract.

"Q. Do you know why that document was necessary? [163]

"A. Well, I suppose probably it was giving an accounting of how the jobs stood at this time. In other words, if he was going out of business, I would have to have a statement of how he stood with Casey Company, or what-not, so the amounts I owed Joe would correspond with the amounts he owed the material house.

"Q. Did you get a similar break-down from the San Mateo Feed & Fuel Company?

"A. As I recall, I did not need one from them. Theirs was a bulk amount. He bought the wash paint from them, like stuff that goes over the plast-

(Testimony of Thomas J. Culligan, Jr.)

er. That would not necessitate 'Job so-and-so'. He would buy that by the sack.

"Q. Did Scardino at any time between December, 1941 and April, 1942 endeavor to collect moneys directly from you? A. No.

"Q. He did not? A. No.

"Q. He never asked you for any moneys at all?

"A. No. That is what surprised me so much about the whole thing. In all fairness to Joe, he could have come to me at any time and said: 'You owe me $2,000; I need $500 for so-and-so'. I wouldn't question him.

"Q. You did not question his financial condition?

"A. I never did. Just to show you: That last week, when he owed labor claims there, I didn't even know he was going out until the last week he went out.

"Q. What week do you refer to?

"A. The last week he was in business; this week of the 20th here. I don't think he paid his men's salaries. I had no idea at that time, even then.

"Q. You believed he had the money to pay it, Mr. Culligan?

"A. Sure. I had always found him very up and up on his dealings.

"Q. You believed he had the money to pay?

[164]

"A. Yes. I was the most surprised man in the world.

"Q. You had no way of ascertaining he did not

(Testimony of Thomas J. Culligan, Jr.)

have the money to pay the laborers? A. No.

"Q. Did you endeavor to ascertain why he did not pay them? A. No.

"Mr. Margolis: That is all.

"Redirect Examination

"Mr. Mullin: Q. Did Mr. Scardino ever tell you he was broke? A. No.

"Q. Or could not pay his bills, that he was insolvent or contemplated filing a petition in bankruptcy? A. No.

"Q. The answer to all that is no? A. Yes.

"Mr. Mullin: That is all, sir.

"Re-cross Examination

"Mr. Pardini: Q. You made two trips to his home that day. Was Mindnich with you on both occasions? A. Yes.

"Q. I think you fixed the time of one trip as what approximate time?

"A. Right after lunch; around 2 or 2:30.

"Q. Both trips?

"A. Right in the afternoon, correct. The whole thing was wound up that day, because Joe had to go to work.

"Q. Those numbers mentioned in Trustee's Exhibit 'A', while you have never seen it, you identify as being job numbers?

"A. Yes, those are correct.

"Q. Were the moneys subsequently paid by you?

"A. Correct.

(Testimony of Thomas J. Culligan, Jr.)

"Q. They were paid substantially as indicated in Trustee's Exhibit 'A'? A. That is correct.

"Q. And, when you went down to Scardino's home in Redwood City on February 20, 1942, how long had it been since Scardino had been on the job? [165]

"A. Oh, I guess it had been probably a week previous, maybe five days previous, since I had seen him. Now, that wasn't out of the ordinary. He had a foreman on the job. It was not out of the ordinary. I might not see him for a week or two weeks.

"Q. But, you already knew he was not going on with the work?

"A. No, I did not know it up until the last minute.

"Q. On the 20th?

"A. Well, probably that time, yes.

"Q. How did you happen to find that out? What was the first notice you had?

"A. The first notice I had was, Mindnich, the credit manager got me on the phone and said he understood Joe Scardino was not going to do our work. I said: 'Funny that doesn't come from Joe. I have fifteen buildings here ready to be plastered.' Some even had the lath work done. I said: 'We better go see Joe.'

"Q. What was the date of that?

"A. I could not tell you.

"Q. Was that the 20th, the day of the letter?

"A. I could not tell you. This was on the phone.

"Q. Mindnich was your employee, was he not?

(Testimony of Thomas J. Culligan, Jr.)

"A. No, he was credit manager for Casey Company.

"Q. How long before?

"A. It was all within a period of two or three days, because I said: 'We better bring it to a head right away.'

"Mr. Pardini: That is all.

"Mr. Margolis: Q. You did not question Scardino on the two trips you made to his home that day about these labor claims or other creditors?

"A. Not at that time, no. At that time I did not know there was any labor claims. The labor claims did not come in for a week or two weeks after, from the Labor Commissioner. [166]

"Q. You know H. E. Casey Company, don't you? A. Oh, yes.

"Q. You know the San Mateo Feed & Fuel Company? A. Correct.

"Q. Do you know Frank Peri?

"A. Yes. Frank Peri done his lathing. He has done it since 1937, when Joe first started.

"Q. Does Frank Peri have men assisting him in the lathing? A. Yes.

"Mr. Mullin: That is objected to as immaterial, incompetent, and irrelevant.

"Mr. Margolis: Certainly, it is. The name Frank Peri appears.

"Mr. Mullin: Frank Peri is not at issue here.

"The Referee: What is your point? What did Frank Peri have to do with the subject matter of this particular hearing?

(Testimony of Thomas J. Culligan, Jr.)

"Mr. Margolis: Well, to show the connection between this general contractor and these Respondents, Your Honor. He claims he did not know of Scardino's condition at all until much later. Here, then, in his own office, on his own stationery, is a letter which purports to direct him to make certain payments to certain people. Frank Peri, as we learn from the bankrupt, had wage claims, labor claims, and the name is very plainly set forth in the letter.

"The Referee: This letter?

"Mr. Margolis: Yes. And the witness testified he knew of no labor claims whatsoever.

"The Witness: Peri would have no occasion to come to me with a thing like that. I don't know Peri exists. He subs that out.

"Q. I did not ask you whether Peri came to you. I asked if you knew whether there were any labor claims and [167] if you knew Frank Peri?

"A. All the wage claims I have is direct with Joe. I found that out two or three weeks after this, when I got the letter from the Labor Commissioner, that the last few jobs in Burlingame Village, the labor was not paid.

"Q. You did not question him at all about the contents of that letter?

"A. What letter are you referring to?

"Q. The letter I am referring to, right there?

"A. Question who?

"Q. Scardino, when you asked him to sign. You had no conversation with him?

(Testimony of Thomas J. Culligan, Jr.)

"A. No. I told him we wanted this thing. He said he was going out of business. I said, in light of that, then, the thing to do is to make an adjustment settlement; that is the only way to do it. The only people involved at that time, there were only three people involved in our work. The material houses were the only ones involved.

"Q. You did not discuss what made up the Peri claim at all? A. No.

"Q. Did you have any record as to what portion to pay Peri? A. No.

"Q. How would you know from the letter?

"A. I finally got one after this. I sent to Peri, San Mateo Feed & Fuel, whoever they are, and got a statement for myself.

"Q. You did not have a statement before that was prepared? A. Of Peri? No.

"Q. San Mateo Feed & Fuel? A. No.

"Q. Of Casey Company?

"A. I think the day I talked with Mindich over the phone, which was two or three days before we contacted Joe, I think I talked to Mindich, because Casey Company, their [168] bill was the major one. I said: 'You better draw a statement, so when we see Joe, we will know what we are doing.'

"Q. Those statements are all available?

"A. Yes.

"Q. And the files?

"A. Oh, yes. Our checks are available from 1937.

(Testimony of Thomas J. Culligan, Jr.)

"Mr. Margolis: I think they ought to be produced.

"Mr. Mullin: I don't see what materiality they have, if Your Honor please. It seems to me there must be a stop somewhere on this fishing expedition. Mr. Culligan is not on trial here. He has come in and testified how the exhibit was obtained, which is directly contrary to the testimony on behalf of the trustee. What Peri has to do with this, is not material.

"The Referee: How is it material?

"Mr. Margolis: Both Respondents are named.

"The Referee: What is the materiality of that?

"Mr. Margolis: I want to tie in that letter with the prior letter of the 18th, which the witness says he knows absolutely nothing about.

"The Referee: How can you tie that in? He says he does not know about that.

"Mr. Pardini: He says it may be in his file.

"The Referee: That is what I say. It would not connect anything up if you got it in. Suppose he has it in his file?

"Mr. Pardini: He stated he made these payments.

"The Referee: He did not say when he made the payments. What difference would it make? I don't see the materiality of it myself. Maybe I am mistaken, but I cannot follow you there. The question is whether this man knew that he was insolvent, or had reason to believe he was insolvent.

(Testimony of Thomas J. Culligan, Jr.)

"Mr. Margolis: He is not a creditor, Your Honor; he is a debtor.

"The Referee: That is all the more reason that it does not help you, [169]

"Mr. Margolis: It would help in this respect, to impeach this testimony. In one breath, the witness testifies he knows of no other document.

"Mr. Mullin: He does not testify to that at all. I am getting tired of counsel sitting here misquoting the record. He said he had no recollection.

"The Referee: He said he had no recollection, and if there is such a document, it is tied in with this letter. I remember that distinctly.

"Mr. Hoffman: Further, he said he had heard from the credit manager of H. E. Casey Company that Scardino was going out of business, and he told him: 'Better find how much we owe; we will go see Joe and find out what is doing.' It is perfectly obvious what happened.

"Mr. Pardini: May I ask this question?

"Q. At the time Scardino left, how many jobs were pending for you?

"A. How many was he working on?

"Q. Yes?

"A. They usually run fifteen or twenty at a time.

"Q. The average job amounted to how much when completed?

"A. The average full contract, say, ran $300. That is the whole contract. He would get 60% when he would put the brown coat on, or $180.

(Testimony of Thomas J. Culligan, Jr.)

"Q. In other words, you had paid something on account of the fifteen jobs under way?

"A. In every one he had got his brown coat.

"Q. You testified also you knew he was working for other contractors? A. Yes.

"Q. I assume he had one or more houses for the other contractors?

"A. I had no idea. I knew he had other contractors.

"Q. The only discussion was, he was going somewhere to earn some money?

"A. He was quitting business. [170]

"Q. You had no discussion regarding his finances, or anything else? Other than the statement to turn over the moneys in your hands to the three people named in that yellow letter?

"A. That is correct.

"Q. I think you have already answered the question: Pursuant to the instructions in the yellow letter, you paid over the sums, which seem familiar from the job numbers, which are familiar, as set forth in Trustee's Exhibit 'A', the letter of February 18th? A. That is correct.

"Mr. Hoffman: And he also got somebody else to finish the jobs.

"Mr. Pardini: Q. Subsequently Scardino came to the office—I don't know whether you testified to that—and you got somebody to finish the jobs?

"A. Yes.

"Mr. Margolis: Q. Who was manager of San

(Testimony of Thomas J. Culligan, Jr.)

Mateo Feed & Fuel Company at the time this was executed?

"A. I don't remember his name.

"Q. Was he there at the time this was executed?

"A. No, only the three parties; Mindich, who is the man who phoned me two or three days before we went down here. I remember as plain as if it were yesterday. He said: 'Joe Scardino is going out of business.' I said: 'Funny that did not come direct to me. After all, we have been doing business for five or six years.'

"Q. What was kind of funny?

"A. That it did not come direct to me, after all was said and done. We went to see Joe. He said: 'I am going into defense work.' At that time, I told him he should stick with it.

"Q. You did not ask about his other creditors?

"A. I had no occasion to.

"Q. Did you know he owed in excess of what he owed to these two creditors?

"A. No, I knew nothing about his finances. All the years [171] we done business with him, I don't know the other contractors he dealt with.

"Q. Casey Company didn't tell you he owed in excess of the moneys you owed him? A. No.

"Q. Neither did Mr. Ferris of the San Mateo Feed & Fuel Company? A. No.

"Q. It struck you rather funny that he was going into defense work?

"A. No. Moreover, he explained he thought he could make more money going into defense work.

(Testimony of Thomas J. Culligan, Jr.)

"Mr. Margolis: That is all.

"Mr. Hoffman: Your Honor, may Mr. Culligan be excused?

"The Referee: Surely.

"(Witness excused).

"JOHN J. DAMONTE,

"Called for Respondents, Sworn.

"The Referee: Q. What is your full name?

"A. John J. Damonte.

"Mr. Hoffman: Q. What is your business address, Mr. Damonte?

"A. 2201 Bay Shore. Business or home?

"Q. Business?

"A. Schlage Lock Company, 2201 Bay Shore.

"Q. You have been with the Schlage Lock Company, how long? A. Since March of 1942.

"Q. In the latter part of 1941 and the early part of 1942, what was your occupation?

"A. I was credit manager for the San Mateo Feed & Fuel Company.

"Q. And, you left them, when?

"A. I believe it was about, I believe it was February 28th.

"Q. Of 1942? A. Of 1942.

"Q. You had been with them how long, as credit manager? A. Since June, 1941.

"Q. You were acquainted with Joe Scardino, were you? A. Yes, sir. [172]

(Testimony of John J. Damonte.)

"Q. And, were you acquainted with the acount?

"A. That is right; I was.

"Q. Did you see Joe Scardino between December of 1941 and April, 1942 on frequent occasions?

"A. Generally, almost every day.

"Q. What was the occasion of seeing him?

"A. To collect money for materials due on jobs which he just completed, or on which he was working.

"Q. Did he, during any of that time, tell you he was broke, going out of business?

"A. Absolutely not.

"Q. Was his position, so far as you were concerned, any different than it had been since you had been connected with San Mateo Feed & Fuel Company?

"A. No. The method of handling him was the way many contractors do business and receive payments for material after they receive the final payment.

"Q. Was your method of handling him any different than handling other plastering contractors?

"A. Of course, there was some very good plastering contractors who discounted their bills every month. I had no need to have dealings with them in a credit sense. On plasterers similar to Joe Scardino, they were handled the same way; probably they are still handled the same way.

"Q. That constituted what percentage of plastering contractors in the county?

(Testimony of John J. Damonte.)

"A. That is hard to say. Of course, I am pretty sour on them. I would say about 50%.

"Q. They were all handled in this manner?

"A. That is right.

"Q. Now, did you know, at any time prior to the time that Scardino went into bankruptcy, that he was contemplating going into bankruptcy?

"A. Absolutely not.

"Q. Did you know he could not pay his bills?

"A. I knew he was hard to collect from, but in my [173] experience, I felt he was just one of those tough babies to collect from; it was up to me to keep after him and get the money.

"Q. Did he ever make statements to you as to what was due or what wasn't due, when you asked for money?

"A. 'As soon as I get the final payment, I will pay you. You don't have to worry about me. I will pay you as soon as I get my money.'

"Q. Did you ever ask him to execute any assignment to you or to the San Mateo Feed & Fuel Company?

"A. Yes, that was the regular practice. Some contractors were reluctant to make that final payment joint. The only other protection we would have would be to lien the job or get an assignment, at which time the main contractor was perfectly free to make a joint check. Merely not to hurt the main contractor's feelings, we got the assignment.

"Q. This assignment dated February 20th you know nothing of that? A. Absolutely nothing.

(Testimony of John J. Damonte.)

"Q. It was not made at your request?

"A. No, sir.

"Q. Did you know at any time that he was having trouble with wage claims, attachments, executions, anything of that nature?

"A. No, no. I amend that; other than this one attachment that I did hear about, but to my knowledge it was subsequently cleared up. He had an attachment on his bank account. Since he never had any money in the bank account anyhow, I wasn't too much concerned with the attachment, since I had to collect the money as he got it on the job.

"Q. Did you know anything about his assets, just what he had and what he did not have?

"A. No, I did not.

"Q. Did you know anything about what he owed aside from the San Mateo Feed & Fuel Company's account?

"A. No, I did not. The Merchants Association in San [174] Mateo, of which the San Mateo Feed & Fuel is a member, had him down as a poor risk, along with the other 50% of the plastering contractors that I mentioned.

"Q. Do you know who Bud Moore is?

"A. Well, do you want to know all I know about him?

"Q. No, just who he is?

"A. He was a former employee, in charge of mixing stucco for San Mateo Feed & Fuel Company. I understand that since he has left.

(Testimony of John J. Damonte.)

"Q. Where is he now?

"A. I understand he is in the service. I haven't seen him since leaving.

"Q. Did Bud Moore ever tell you anything about Scardino's telling him he was going through bankruptcy?

"A. He did tell me that on the morning of the 20th of February, I believe, or right at that time.

"Q. What did he say? You mean the 20th of February?

"Mr. Margolis: Just a minute, may it please Your Honor. I object to the second question on the ground that it is leading and sugegstive.

"Mr. Hoffman: We will permit the Judge to be the judge of that.

"The Referee: February 20th is the date.

"The Witness: A. To the best of my knowledge, this took place two years ago; two years, it is very hard to remember since I left and went into an entirely different business. Two years later, there is a possibility of error. I want to put that in anyway.

"To the best of my knowledge, it was around that time.

"Q. How do you fix the time?

"A. By the ledger card of San Mateo Feed & Fuel Company, because at that time we checked up a lot of plaster drums on which there is a certain amount of deposit charged. You better try March 1st; possibly you will get a check-up of those drums.

[175]

(Testimony of John J. Damonte.)

"Q. And what was the information you received? What was it Moore told you?

"A. He told me Scardino is thinking of filing bankruptcy.

"Q. Then what did you do?

"A. Then I went and got those barrels, those drums.

"Q. That belonged to you?

"A. That is right.

"Q. That is the first knowledge you had?

"A. Absolutely.

"Mr. Hoffman: I think that is all.

"Cross Examination

"Mr. Margolis: Q. You say you ceased your employment with San Mateo Feed & Fuel Company on February 28, 1942? A. I believe it was.

"Q. Could it have been later or earlier?

"A. I believe it definitely was February 28th.

"Q. You remember that definitely?

"A. That is right.

"Q. You also testified you called on Mr. Scardino every day without exception?

"A. Well, I say every day. He was on my list of people to watch, get your money.

"Q. When did he get on your list of people?

"A. When I went to work for San Mateo Feed & Fuel Company. My predecessor left me a list of accounts I should watch.

"Q. You got that in June, 1941?

"A. Absolutely right.

"Q. You watched Mr. Scardino every day?

(Testimony of John J. Damonte.)

"A. Since that time.

"Q. Without exception?

"A. Not every day. He was in the back of my mind every day, yes.

"Q. You say you found he never had money in the bank, at the time of this attachment that you were familiar with?

"A. Whether I actually had found he had no money in the bank, I don't know. What I mean to say is, I just didn't feel there was any money in there.

"Q. Did you make inquiry? [176]

"A. I may have. I am trying to remember on what I am basing the opinion that the bank account was footless. Maybe the gossip was that he had no money. I know what it is. He had his payroll payment and could not meet the payments back in 1941. I knew at that time there was no use worrying about his bank account, attaching it or anything else to get out money.

"Q. That condition prevailed all through that period until you ceased employment with the San Mateo Feed & Fuel Company?

"A. What condition is that?

"Q. That checks were bouncing on his payroll?

"A. I don't know about that. I know on that one occasion I thought I had discovered something. I said: "Now I know where his bank account is. I don't have to worry', and undoubtedly, I found out the checks were bouncing and forgot the bank account.

(Testimony of John J. Damonte.)

"Q. When was that, January, 1942?

"A. No, that was in 1941, the fall of '41.

"Q. December or thereabouts?

"A. I haven't the least idea.

"Q. Did you follow your investigation or examination until after the time these checks bounced?

"A. What examination is that?

"Q. To see whether his bank account had improved in any particular?

"A. I gave it no more thought. I thought after that, it is up to me to keep after him, if the contractors were anywhere good.

"Q. You passed this information along to your employer, did you not, to Mr. Ferris?

"A. Well, I don't know.

"Q. Who was your immediate superior?

"A. Mr. Ferris.

"Q. Did he ever ask you about this account?

"A. That is right. [177]

"Q. You went over these accounts you fell heir to from your predecessor in the job? You went over those with Mr. Ferris? A. That is right.

"Q. You had one of those Monday morning meetings at 9:30 before you would go out? How frequently would you discuss these matters with Mr. Ferris?

"A. I don't know. Every now and again when he said: 'We have to get some dough in here.'

"Q. How often would he ask you; would he take it up with you almost every Friday?

(Testimony of John J. Damonte.)

"A. I cannot answer that. Suffice to say, I did get repeated requests to go get some money.

"Q. From Mr. Ferris? A. Yes.

"Q. You told him about these payroll checks bouncing, did you not?

"A. No, I don't think so.

"Q. Did he ask you, or suggest to you that you make an investigation to see what bank Scardino did business with? A. No.

"Q. You did that on your own?

"A. Yes; as credit manager, I was trying to find out as much as I could.

"Q. That was part of your work?

"A. That was part of my work.

"Q. To make a complete investigation?

"A. Yes.

"Q. You made a complete investigation as to Mr. Scardino?

"A. As near as I could. Some of this information is hard to get. Often times a man has hidden angles you don't know about.

"Q. Did you inquire about the hidden angles?

"A. Every way I could.

"Q. You found he had no property?

"A. I knew about the truck he had, and I heard from Bud Moore that Mr. Scardino had a lot in San Mateo.

"Q. San Mateo? A. Yes. [178]

"Q. Did you investigate as to the value of it?

"A. No. Our experience has been in attaching contractors' similar properties, by the time we get

(Testimony of John J. Damonte.)

through filing a suit, getting judgment, enforcing it, we wind up lucky to break even. That is a bad method of betting your money.

"Q. It wasn't enough to go after, in other words? A. Yes.

"Mr. Hoffman: Wait a minute.

"Mr. Margolis: He answered yes. If you have an objection to make, make it to the Court and we will submit the objection.

"Q. You conveyed this information resulting from the investigation you made to Mr. Ferris?

"A. What investigation?

"Q. With respect to your attempt to collect?

"A. I said there was darned little to collect from.

"Q. Did you tell him about the property in San Mateo? A. No.

"Q. Did you tell him about the attachment in San Mateo? A. He knew about that.

"Q. How did he find out?

"A. While I was with the company, we were a member of the Title Guaranty Co., is it? That publishes daily records of all court transactions in Redwood City. We got a copy of that and it was generally read by both Mr. Ferris and me.

"Q. And yourself as credit manager?

"A. That is right.

"Q. Do you know when you read it? Was it December, 1941 or February, 1942?

"A. I haven't the least idea. That had no bearing on my following up his account.

(Testimony of John J. Damonte.)

"Q. You were only there from June, 1941 to February, 1942?

"A. No, it must have been June, 1940.

"Q. Was it closer to that time, that is, your ascertaining?

"A. I am not sure. Let me check. I have a record of [179] when I actually did go to work for San Mateo Feed & Fuel Company.

"Q. That is not important.

"A. You are stressing the date. I want to be sure. You are making it important in my mind, at any rate. June, 1941, is correct.

"Q. Now, having that date in mind, having in mind about ascertaining about the attachment, can you tell us whether it was clear to the time you made connection with San Mateo Feed & Fuel or to the time you severed your connection with San Mateo Feed & Fuel Company?

"A. I do not know. I absolutely do not know. In fact, the whole incident is really vague. There was that little importance attached to it at the time.

"Q. And did you tell Mr. Ferris, in your investigation of this matter, about this lot? I don't recall whether I asked you this or you answered it: About this piece of property in San Mateo County? Did you tell Mr. Ferris about that?

"A. No. I did not check into it to check into the court records to see if there was a lot. I just had this hearsay from Bud Moore, who assured me he was a good friend of Mr. Scardino and I did not have to worry about collecting the money.

(Testimony of John J. Damonte.)

"Q. Your investigation revealed he had nothing, no money in the bank?

"A. What investigation? By investigation, I checked with our membership in the Credit Men's Association. That is as far as an investigation I could make, other than going around to the contractors and seeing how much money he had coming and how much we should get out of it for material.

"Q. So far as you know from your contacts with the credit association and with the bank, however, you found out he had no money in the bank and no other property? [180]

"Mr. Hoffman: I submit that has been asked and answered.

"The Witness: A. No, I would not say that.

"Mr. Hoffman: All right.

"Mr. Margolis: Q. What would you say, Mr. Damonte?

"A. I don't know what you are driving at. Do you want definite answers to definite questions? I am willing to make them, Your Honor.

"The Referee: Answer the question.

"A. I would like to know definitely what the question is.

"Mr. Margolis: I think the question is plain, Your Honor.

"(Question read.)

"Mr. Hoffman: That assumes facts not in evidence, if Your Honor please.

"The Referee: What does it assume, not in evidence?

(Testimony of John J. Damonte.)

"Mr. Hoffman: His investigation with the bank. He has testified there was no investigation.

"The Referee: That is true.

"Mr. Margolis: I will reframe the question.

"Q. Your inquiries made from this credit association revealed that he had no property and that he was a poor risk. Is that correct?

"A. No. The same classification as a lot of other plasterers: 'Be very careful in handling this account.'

"Q. You knew that right along?

"A. That is correct: I knew that right along, that he, as a plasterer, was one to watch.

"Q. However, you found out about this attachment at the bank. Did you make inquiry, after you found out, from the bank or other source?

"A. I did not make inquiry.

"Mr. Margolis: That is all.

"The Referee: Anything else?

"Mr. Hoffman: I have no further questions.

[181]

"(Witness excused.)

"JULES MINDNICH

called for Respondends, Sworn.

"Mr. Mullin: Q. Your name is Jules Mindnich?

"A. Yes.

"Q. You were credit manager for H. E. Casey Company in 1941 and 1942. Is that correct?

(Testimony of Jules Mindnich.)

"A. Up to May of 1942.

"Q. You know Joe Scardino, the bankrupt?

"A. Yes.

"Q. Did Mr. Scardino ever tell you he was broke? A. No.

"Q. Did he ever tell you he was insolvent?

"A. No.

"Q. Did he ever tell you he was contemplating bankruptcy? A. No.

"Q. Did he ever tell you he could not pay his bills? A. No.

"Cross Examination

"Mr. Margolis: Q. Do you know Mr. Damonte, who just testified?

"Mr. Mullin: To which I object. This is cross examination; it hasn't been disputed by the issues or the question asked the witness.

"Mr. Margolis: Q. What was your capacity at Casey Company?

"A. Credit manager.

"Q. Did Casey Company belong to the same association mentioned by Mr. Damonte?

"Mr. Mullin: To which I object on the ground that it is incompetent, irrelevant and immaterial.

"The Witness: They belonged to no association.

"Mr. Margolis: Q. Do you know Mr. Ferris?

"Mr. Mullin: To which I object as being improper cross examination.

"The Referee: That is true. Listen to the questions [182] he asked. He limited his questions.

"Mr. Margolis: Q. Did you ever speak with

(Testimony of Jules Mindnich.)

Mr. Scardino about the deficiency, or the account owed to your employer?

"Mr. Mullin: To which I object as not being proper cross examination.

"The Referee: Oh, yes. He said he never told him he was insolvent.

"Mr. Margolis: He asked if he ever told him he was insolvent, unable to pay his bills, broke, or contemplating bankruptcy?

"The Referee: He may answer this question. Answer the question.

"(Question read.)

"Mr. Mullin: That is a compound question. I object on the ground that it is compound.

"The Referee: That is true. Objection sustained.

"Mr. Margolis: Q. Did you ever speak to Mr. Scardino——

"The Witness: A. Yes.

"Q. Did you ever speak to Mr. Scardino with respect to the account he owed H. E. Casey Company? A. Yes.

"Q. When was the last time you spoke to him about it?

"A. Oh, I would say the last time I saw him, whenever that was.

"Mr. Pardini: That is stipulated.

"Mr. Margolis: Q. When was the last time you saw him, Mr. Mindnich?

"A. The last time I saw him was when he signed this letter.

(Testimony of Jules Mindnich.)

"Q. You did not see him after that at all?

"A. No.

"Q. Can you give the facts or circumstances that arose which caused that letter to be signed?

"A. Yes. I tried to find Joe Scardino for about a week.

"Q. Was he hiding, Mr. Mindnich?

"A. I don't know. I could not find him. I could not locate him anywhere. [183]

"Q. Did you try him at his home?

"A. I did not know where he lived. He always came into the office. I did not know what his home address was; I had to get it from the union. The union gave it to me and then I went down.

"Q. What was the discussion when that was signed?

"A. I wanted to know what was wrong. I heard from somebody else.

"Q. You wanted to know, what?

"A. What was wrong.

"Q. About what?

"A. With Joe; whether he was sick, or what.

"Q. You just said you heard something?

"A. I heard he was working. I tried to find him. I wanted to talk to him. Sure enough, I went down once and he was not home; then I went again when he came back from work, I went back again.

"Q. Was that on the 20th of February?

"A. Yes.

"Q. That is a total of two trips. You went

(Testimony of Jules Mindnich.)

there, he was at work; then, you went back?

"A. No. We had one conversation and he went out to the grocery store or some place.

"Q. You waited while he went to the grocery store? A. That is right.

"Q. Didn't you see him once and leave to prepare that paper and come back?

"A. No. I had the information on that paper when I went down.

"Q. You heard Mr. Culligan testify a minute ago, didn't you? A. Yes.

"Q. You were sitting in the court room?

"A. Right.

"Q. That you went and spoke with Mr. Scardino first——

"A. No, I didn't hear him say that.

"Q. Then left and went back to the office of Conway & Culligan?

"A. I heard him say so, yes, a couple of times.

"Q. Drew that document and then returned to Mr. Scardino's [184] home. Did you hear him testify to that? A. No.

"Q. You did not? Do you know when was the time prior to February 20th that you saw Mr. Scardino?

"A. It must have been about a week.

"Q. What was the occasion for seeing him then?

"A. No particular occasion, except I seen him whenever I went the rounds. If he was around, I would talk to him.

"Q. What did you talk to him about?

(Testimony of Jules Mindnich.)

"Mr. Mullin: It is stipulated he would say: 'How do you do.' We are getting very far afield.

"Mr. Margolis: The parrot-like answers to the questions——

"Mr. Mullin: To which I object, if it please the Court. If counsel will pay any attention to his rules of evidence, the proper procedure and rules of evidence in answering a question is to answer yes or no and give an explanation. We are attempting to expedite this. Your Honor wants to go home, so does the reporter.

"The Referee: Ask a question.

"Mr. Margolis: There is a question pending.

"The Referee: What did you talk to him about? That is the question.

"The Witness: A. Anything. 'How are you Joe.'

"Mr. Margolis: Q. You were the credit manager for H. E. Casey Company at that time?

"A. Yes.

"Mr. Margolis: No further questions, Your Honor.

"(Witness excused.)

"Mr. Mullin: Submitted.

"Mr. Hoffman: Submitted, Your Honor.

"(Submitted.)"

(See original of Reporter's Transcript of proceedings of November 22, 1943, pages 2 to 65, inclusive, handed up herewith as a part of this certificate and report.) [185]

Subsequently, and on December 27, 1943, the following order was entered herein:

"Whereas, the matters involved herein came before the court on the petition of G. S. Hayward, the trustee of the estate of the above-named bankrupt, represented by Max H. Margolis, Esq., the order to show cause based upon said petition, the answer of San Mateo Feed and Fuel Co., a corporation, represented by F. E. Hoffman, Esq., the answer of H. E. Casey Company, a copartnership, represented by Hugh F. Mullins, Jr., Esq., the evidence taken upon the original hearing and the further hearing on said petition, order to show cause, and said answers to said petition and order to show cause, and

"Whereas, the record herein, particularly schedule A-3 of the bankrupt, shows that the following creditors are listed as those whose claims are unsecured: State Compensation Ins. Fund, 445 McAllister Street, San Francisco, California, 1940 and 1941 (San Francisco Municipal Court action number 162,430)—$344.30; Industrial Indemnity Co., San Francisco, California, 11/6 to 12/6-41—$74.80; Industrial Indemnity Co., San Francisco, California, 12/6 to 1/6-42—$59.12; Blake-Moffit-Towne Paper Co., 599 Eighth Street, San Francisco—$74.00; Markus Cut-Rate Hardware, Seventh & Washington Sts., Oakland—$331.00; Frank Peri, 920 South Idaho, San Mateo, California—$900.00, and Sequoia Grocery Market, 2525 Broadway, Redwood City, California—$75.00, and

"Whereas, after the aforesaid hearings, the mat-

ters were submitted, and the court, now being advised fully in the premises, finds that:

"(1) On April 29, 1942, the above-named bankrupt's petition for adjudication in bankruptcy was filed herein;

"(2) On May 21, 1942, G. S. Hayward, became, ever [186] since has been, and now is the duly appointed, qualified and acting trustee of the above-named bankrupt's estate;

"(3) On said date of said filing of said petition, as hereinbefore set forth, said bankrupt had assets, among them being the sum of $2,534.76, assigned to H. E. Casey Company, and the sum of $1,025.35 assigned to San Mateo Feed and Fuel Co.;

"(4) Said assignments were, and each of them was, made by said bankrupt to the respective assignees within four months of the filing of the bankrupt's petition to be adjudicated a bankrupt, and said assignments were, and each of them was, without any consideration therefor;

"(5) At the time of the making of said assignment by the bankrupt to said H. E. Casey Company, said bankrupt was insolvent, and, at said time, said H. E. Casey Company had reasonable cause to believe that said bankrupt was insolvent;

"(6) At the time of the making of said assignment by the bankrupt to said San Mateo Feed and Fuel Co., said bankrupt was insolvent, and, at said time, said San Mateo Feed and Fuel Co. had reasonable cause to believe that said bankrupt was insolvent;

"(7) When said assignment was made to said

H. E. Casey Company the estate of said bankrupt was, and still is, depleted to the extent of $2,534.76;

"(8) When said asignment was made to said San Mateo Feed and Fuel Co., the estate of said bankrupt was, and still is, depleted to the further extent of $1,025.35;

"(9) By said asignment by said bankrupt to said H. E. Casey Company said last mentioned company secured an undue advantage over other creditors of the same class who, like said last mentioned company and said San Mateo Feed and Fuel Co. were, and are, unsecured creditors of said bankrupt; [187]

"(10) By said assignment by said bankrupt to said San Mateo Feed and Fuel Co., said last mentioned company secured an undue advantage over other creditors of the same class who, like said H. E. Casey Company were, and now are, unsecured creditors of said bankrupt;

"(11) Upon the filing of said petition for said adjudication in said bankruptcy, each of the aforesaid sums, which in fact and in law was held in trust by the respective assignees for the benefit of the estate of said bankrupt and all the creditors thereof, passed into the custody of the bankruptcy court, and, upon the appointment and qualification of the aforesaid trustee in bankruptcy, passed to said last mentioned trustee to be administered herein as a part of the estate of said bankrupt;

"(12) Said H. E. Casey Company is holding said sum of $2,534.76 without color or right of title

thereto or any part thereof, except as a de facto trustee for the estate of said bankrupt and all the creditors thereof, and

"(13) Said San Mateo Feed & Fuel Co. is holding said sum of $1,025.35, without color or right of title therto and/or any part thereof, except as a de facto trustee for the estate of said bankrupt and all the creditors thereof.

"The court, therefore, concludes as matters of law that:

"(1) Said trustee in bankruptcy, G. S. Hayward, is entitled to have turned over to the estate of said bankrupt the sum of $2,534.76 from said H. E. Casey Company and that said last mentioned company should forthwith turn over to said last mentioned trustee in bankruptcy said sum of $2,534.76, and [188]

"(2) Said trustee in *bankrupt,* G. S. Hayward, is entitled to have turned over to the estate of said bankrupt the sum of $1,025.35 by said San Mateo Feed and Fuel Co., and said last mentioned company should forthwith turn over to said last mentioned trustee in bankruptcy said sum of $1,025.35:

"It Hereby Is Ordered, Adjudged and Decreed that:

"(1) H. E. Casey Company forthwith turn over to G. S. Hayward, as the duly appointed, qualified and acting trustee of the estate of the above-named bankrupt the sum of $2,534.76, and the whole thereof, and

"(2) San Mateo Feed and Fuel Co. forthwith turn over to G. S. Hayward, as the duly appointed, quali-

fied and acting trustee of the estate of the above-named bankrupt the sum of $1,025.35, and the whole thereof.

"Dated: December 27, 1943.

"BURTON J. WYMAN

"Referee in Bankruptcy"

(See original of said order handed up herewith as a part of this certificate and report.)

In due time, and on February 26, 1944, the following verified petition for review was filed herein by F. E. Hoffmann, Esq., and Arthur P. Shapro, Esq., on behalf of San Mateo Feed and Fuel Co.:

"Comes now San Mateo Feed and Fuel Co., a corporation, and respectfully represents:

"That heretofore, and on the 27th day of December, 1943, Hon. Burton J. Wyman, Referee in Bankruptcy of the above-entitled Court, made, signed and filed herein that certain 'Order Directing San Mateo Feed and Fuel Co. and H. E. Casey Company to Turn Over Certain Moneys to Trustee,' a full, true and correct copy of which is hereto annexed, marked Exhibit 'A', and hereby expressly referred to and made part hereof.

"That said Referee's Order, dated December 27, 1943, adversely affects your Petitioner in so far as it orders your Petitioner to forthwith turn over to the Trustee of the estate of the above-named Bankrupt, the sum of $1,025.35, and the whole thereof. [189]

"That said Referee's Order, dated December 27,

1943, and each and every part thereof, was and is erroneous and contrary to law, and more particularly,

"(1) That said Referee's Order is not supported by, and is contrary to, the evidence adduced by said Trustee and by your Petitioner upon the hearing and upon the further hearing of said Trustee's Petition for Turnover Order, filed herein on April 2, 1943, and upon the Order to Show Cause thereon issued herein on said 2nd day of April, 1943.

"(2) That the Findings of said Referee, contained in his said Order dated December 27, 1943, to wit, Findings numbered (3), (4), (6), (8), (10), (11), and (13) thereof, are not supported by and are contrary to the evidence adduced by said Trustee and by your Petitioner upon the aforesaid hearing and further hearing of said Trustee's Petition for Turnover Order and the Order to Show Cause thereon.

"(3) That said Trustee's Petition for Turnover Order, filed herein on said 2nd day of April, 1943, does not state facts sufficient to warrant the granting, by this Court, to said Trustee, of the relief therein prayed for and/or granted to said Trustee by said Referee's Order dated December 27, 1943.

"(4) That said Referee improperly received and considered as evidence, as against this Petitioner, upon the said hearing and further hearing of said Petition for Turnover Order, all of the records of the above-entitled proceeding, including the Bankrupt's Schedule and the ex parte Affidavit filed by the Bankrupt in support of the Trustee's Petition

for Review of the Referee's original Order on Petition of Trustee And Order to Show Cause Based Thereon, dated September 15, 1943, in that both said Schedule and said ex parte Affidavit were and are not binding upon your Petitioner and constitute hearsay as against your Petitioner.

"(5) That all of the evidence adduced upon the said [190] hearing and further hearing of said Trustee's Petition for Turnover Order and the Order to Show Cause thereon issued herein, is insufficient to warrant this court in granting to said Trustee the relief contained in said Referee's Order of December 27, 1943.

"(6) That the evidence adduced upon said hearing and further hearing of said Trustee's Petition for Turnover Order and the Order to Show Cause thereon issued herein, shows affirmatively, and contrary to the Findings of said Referee, contained in his said Order of December 27, 1943, that the assignment of said sum of $1,025.35 to your Petitioner by the Bankrupt was made more than four months prior to the commencement of the above-entitled proceedings, and was so made for a present valuable and adequate consideration; and that even if made within said four months prior to the commencement of the above-entitled proceedings, said assignment was then made for a current valuable and adequate consideration.

"(7) That it affirmatively appears from the evidence adduced upon said hearing and further hearing of said Trustee's Petition for Turnover Order

and the Order to Show Cause thereon, and contrary to the Findings of said Referee, contained in his Order of December 27, 1943, that in and by the aforesaid assignment of the sum of $1,025.35 to your Petitioner, the estate of the Bankrupt was not depleted to the extent of that sum, or any sum, or at all; and that said asignment did not enable your Petitioner to secure an undue advantage over other creditors of said Bankrupt of the same class; and more particularly, that your Petitioner was, at all of the times herein mentioned, a secured creditor and not an unsecured creditor of said Bankrupt.

"8. That it does not appear from the evidence adduced upon the said hearing and further hearing of said Trustee's [191] Petition for Turnover Order and the Order to Show Cause thereon, nor is it a fact, that at the time of the making of the assignment of said sum of $1,025.35 to your Petitioner by said Bankrupt, even if such assignment took place, as alleged by said Trustee, within the four months next preceding the commencement of the above-entitled proceedings, said Bankrupt was then and there insolvent, nor that your Petitioner, at the time of the making of such assignment, had reasonable cause to believe that said Bankrupt was then and there insolvent.

"9. That it does not appear from the evidence adduced upon the said hearing and further hearing of said Trustee's Petition for Turnover Order and the Order to Show Cause thereon, that the estate of the above-named Bankrupt is itself, with respect

to the claims of creditors on file, approved and allowed herein, insolvent, and/or that the assets in the hands of said Trustee are insufficient to pay all of the claims of creditors so filed, approved and alowed herein in full.

"Wherefore, your Petitioner, feeling aggrieved, as aforesaid, by reason of said Referee's Order dated December 27, 1943, prays that said Referee's Order, a full, true and correct copy of which is hereto annexed and marked Exhibit 'A' hereof, may be, by the Judge of the above-entitled Court, reviewed, pursuant to the provisions of the Acts of Congress Relating to Bankruptcy, and more particularly, to Section 39c thereof; and that said Referee's Order, dated December 27, 1943, may be thereafter, by said Judge of this Court, reversed; or for such other, further or different order or relief as to the Judge of this Honorable Court may seem just in the premises.

"SAN MATEO FEED AND
FUEL CO.

"By ARTHUR P. SHAPRO
"Its Attorney
"Petitioner

"F. E. HOFFMANN
and
"ARTHUR P. SHAPRO
"Attorneys for Petitioner"

[192]

[For the sake of brevity, the verification and Exhibit "A" attached to said petition, are omitted, said exhibit being a copy of the order of December 27, 1943, hereinbefore set forth in full.]

(See original of said last mentioned petition of San Mateo Feed and Fuel Co. handed up herewith as a part of this certificate and report.)

DISCUSSION BY AND OPINION OF REFEREE

Because, for the most part, the objections raised to the order in controversy appear to go to the proposition that there was insufficient evidence before the court to justify said order, I do not believe that anything I could say at this time would be of any assistance to the court in determining the correctness, or incorrectness, of the complained-of order. The record herein is complete and speaks for itself.

There is a proposition apart from the contention as to the insufficiency of evidence which, in my opinion, deserves mention. On page 134 of the herein certificate and report the following appears:

> "4. The said Referee improperly received and considered as evidence, as against this Petitioner, upon the said hearing and further hearing of said Petition for Turnover Order, all of the records of the above-entitled proceeding, including the Bankrupt's Schedule and the ex parte Affidavit filed by the Bankrupt in support of the Trustee's Petition for Review of the Referee's original Order on Petition of

> Trustee And Order to Show Cause Based Thereon, dated September 15, 1943, in that both said Schedule and said ex parte Affidavit were and [193] are not binding upon your Petitioner and constitute hearsay as against your Petitioner."

An examination of the record herein, however, clearly shows, I believe, that the affidavit referred to in the present petition for review herein was used solely for one purpose, i.e., as a part of the trustee's offer of proof mentioned in said trustee's petition for review. (Pages 62 to 67 hereof, inclusive).

Furthermore, the record shows beyond question that the bankrupt not only was examined, but also was cross-examined in connection with certain matters which were dealt with in his affidavit which, as I read the record, was not used upon the further hearing, except only to the extent that counsel for the trustee mentioned it in framing certain questions propounded to the bankrupt during the further hearing. It, therefore, would appear that respondent's only purpose in bringing said affidavit into the record in connection with the present petition for review is in the hope of obtaining a rehearing on trustee's petition for review which, by the District Court's order of October 4, 1943, resulted in the further hearing out of which respondent's present petition for review arises.

PAPERS HANDED UP HEREWITH

The following papers are handed up herewith as a part of this certificate and report:

(1) Notice of Further Hearing of Trustee's Petition for a Turnover Order;

(2) Affidavit of Service of Notice of Further Hearing of Trustee's Petition for a Turnover Order;

(3) Affidavit of Service of Notice of Further Hearing of Trustee's Petition for a Turnover Order;

(4) Reporter's Transcript of Proceedings of November 22, 1943;

(5) Order Directing San Mateo Feed and Fuel Co. and H. E. [194] Casey Company to Turn Over Certain Moneys to Trustee;

(6) Order Extending Time to File Petition for Review;

(7) Order Extnding Time to File Petition for Review;

(8) Order Extending Time to File Petition for Review;

(9) Order Extending Time to File Petition for Review; and

(10) Petition for Review.

Dated: July 20, 1944.

Respectfully submitted,

BURTON J. WYMAN

Referee in Bankruptcy

[Endorsed]: Filed Jul. 20, 1944. [195]

[Title of District Court and Cause.]

NOTICE OF FURTHER HEARING OF TRUSTEE'S PETITION FOR A TURNOVER ORDER

To H. E. Casey Company, Respondent, and Hugh F. Mullin, Esq., Its Attorney, San Mateo Feed and Fuel Company, Respondent, and F. E. Hoffmann, Esq., Its Attorney, Joseph Louis Scardino, Bankrupt, and Julian Pardini, Esq., His Attorney:

You and Each of You Will Please Take Notice and You Are Hereby Notified that the further hearing of the Trustee's petition for a turnover order will be held before the Honorable Burton J. [196] Wyman, Referee In Bankruptcy, at his courtroom, #609 Grant Building, Seventh and Market Streets, San Francisco, California, on the 22nd day of November, 1943, at the hour of 2:00 o'clock P. M., of said day or as soon thereafter as counsel may be heard.

Dated: San Francisco, California, November 8, 1943.

G. S. HAYWARD
Trustee
MAX H. MARGOLIS
Attorney for Trustee

[Endorsed]: Filed with Referee Nov. 8, 1943.

[Endorsed]: Filed with Clerk Jul. 20, 1944.

[197]

[Title of District Court and Cause.]

ORDER DIRECTING SAN MATEO FEED AND FUEL CO. AND H. E. CASEY COMPANY TO TURN OVER CERTAIN MONEYS TO TRUSTEE

Whereas, the matters involved herein came before the court on the petition of G. S. Hayward, the trustee of the estate of the above-named bankrupt, represented by Max H. Margolis, Esq., the order to show cause based upon said petition, the answer of San Mateo Feed and Fuel Co., a corporation, represented by F. E. Hoffman, Esq., the answer of H. E. Casey Company, a copartnership, represented by Hugh [198] F. Mullins, Jr., Esq., the evidence taken upon the original hearing and the further hearing on said petition, order to show cause, and said answers to said petition and order to show cause, and

Whereas, the record herein, particularly schedule A-3 of the bankrupt, shows that the following creditors are listed as those whose claims are unsecured: State Compensation Ins. Fund, 445 McAllister Street, San Francisco, California, 1940 and 1941 (San Francisco Municipal Court action number 162,430—$344.30; Industrial Indemnity Co., San Francisco, California, 11/6 to 12/6-41—$74.80; Industrial Indemnity Co., San Francisco, California, 12/6 to 1/6-42—$59.12; Blake-Moffit-Towne Paper Co., 599 Eighth Street, San Francisco—$74.00; Markus Cut-Rate Hardware, Seventh & Washington Sts., Oakland—$331.00; Frank Peri, 920 South

Idaho, San Mateo, California—$900.00, and Sequoia Grocery Market, 2525 Broadway, Redwood City, California—$75.00, and

Whereas, after the aforesaid hearings, the matters were submitted, and the court, now being advised fully in the premises, finds that:

(1) On January 29, 1942, the above-named bankrupt's petition for adjudication in bankruptcy was filed herein;

(2) On May 21, 1942, G. S. Hayward became, ever since has been, and now is the duly appointed, qualified and acting trustee of the above-named bankrupt's estate;

(3) On said date of said filing of said petition, as hereinbefore set forth, said bankrupt had assets, among them being the sum of $2,534.76, assigned to H. E. Casey Company, and the sum of $1,025.35 assigned to San Mateo Feed and Fuel Co.;

(4) Said assignments were, and each of them was, made by said bankrupt to the respective assignees within four months of the filing of the bankrupt's petition to be adjudicated a bankrupt, and said assignments were, and each of them was, without any consideration therefor;

(5) At the time of the making of said assignment by the [199] bankrupt to said H. E. Casey Company, said bankrupt was insolvent, and, at said time, said H. E. Casey Company had reasonable cause to believe that said bankrupt was insolvent;

(6) At the time of the making of said assignment by the bankrupt to said San Mateo Feed and Fuel Co., said bankrupt was insolvent, and, at said

time, said San Mateo Feed and Fuel Co. had reasonable cause to believe that said bankrupt was insolvent;

(7) When said assignment was made to said H. E. Casey Company the estate of said bankrupt was, and still is, depleted to the extent of $2,534.76;

(8) When said assignment was made to said San Mateo Feed and Fuel Co., the estate of said bankrupt was, and still is, depleted to the further extent of $1,025.35;

(9) By said assignment by said bankrupt to said H. E. Casey Company said last mentioned company secured an undue advantage over other creditors of the same class who, like said last mentioned company and said San Mateo Feed and Fuel Co. were, and are, unsecured creditors of said bankrupt;

(10) By said assignment by said bankrupt to said San Mateo Feed and Fuel Co., said last mentioned company secured an undue advantage over other creditors of the same class who, like said H. E. Casey Company were, and now are, unsecured creditors of said bankrupt;

(11) Upon the filing of said petition for said adjudication in said bankruptcy, each of the aforesaid sums, which in fact and in law was held in trust by the respective assignees for the benefit of the estate of said bankrupt and all the creditors thereof, passed into the custody of the bankruptcy court, and, upon the appointment and qualification of the aforesaid trustee in bankruptcy, passed to

said last mentioned trustee to be administered herein as a part of the estate of said bankrupt.

(12) Said H. E. Casey Company is holding said sum of $2,534.76 without color or right of title thereto or any part there- [200] of, except as a de facto trustee for the estate of said bankrupt and all the creditors thereof, and

(13) Said San Mateo Feed and Fuel Co. is holding said sum of $1,025.35 without color or right of title thereto and/or any part thereof, except as a de facto trustee for the estate of said bankrupt and all the creditors thereof.

The court, therefore, concludes as matters of law that:

(1) Said trustee in bankruptcy, G. S. Hayward, is entitled to have turned over to the estate of said bankrupt the sum of $2,534.76 from said H. E. Casey Company and that said last mentioned company should forthwith turn over to said last mentioned trustee in bankruptcy said sum of $2,534.76, and

(2) Said trustee in *bankrupt,* G. S. Hayward, is entitled to have turned over to the estate of said bankrupt the sum of $1,025.35 by said San Mateo Feed and Fuel Co., and said last mentioned company should forthwith turn over to said last mentioned trustee in bankruptcy said sum of $1,025.35:

It Hereby Is Ordered, Adjudged and Decreed that:

(1) H. E. Casey Company forthwith turn over to G. S. Hayward, as the duly appointed, qualified and acting trustee of the estate of the above-named

bankrupt the sum of $2,534.76, and the whole thereof, and

(2) San Mateo Feed and Fuel Co. forthwith turn over to G. S. Hayward, as the duly appointed qualified and acting trustee of the estate of the above-named bankrupt the sum of $1,025.35, and the whole thereof.

Dated: December 27, 1943.

BURTON J. WYMAN
Referee in Bankruptcy

[Endorsed]: Filed with Referee Dec. 27, 1943.

[Endorsed]: Filed with Clerk Jul. 20, 1944.

[201]

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable, the above entitled Court and Burton J. Wyman, Referee in Bankrutcy:

H. E. Casey Company, a co-partnership, being aggrieved because of the Order made and entered by the above entitled Court on the 27th day of December, 1943, prays that same may be reviewed as provided in the Bankruptcy Act of 1898, and amendments thereof, and said petitioner respectfully shows:

I.

That in the course of the proceedings on the said 27th day of December, 1943, an Order, a copy of which is hereto annexed and marked Exhibit "A", was made and entered herein. [202]

II.

That pursuant to application duly made by petitioner and Orders made and entered in the above entitled proceedings, petitioner's time within which to file its Petition for Review of said Order was extended to and including the 27th day of February, 1944.

III.

That said Order was and is erroneous in that said Order is contrary to law.

IV.

That said Order is contrary to the evidence.

V.

That said Order is contrary to equity.

VI.

That said Order is unsupported by evidence.

VII.

That the trustee's petition, pursuant to which said Order was made and entered, did not state facts sufficient to warrant the Court to make and enter said Order or any Order against petitioner.

VIII.

That the Referee erred in receiving and considering evidence improperly admitted upon said hearing to the prejudice of said petitioner in allowing and receiving in evidence all of the records of the above entitled proceedings including the schedule and ex parte affidavit filed by the bankrupt notwith-

standing said evidence was and is "hear-say" as against this petitioner for review.

IX.

That the said Order of the Referee is erroneous in that the evidence offered, introduced and received by him upon the hearing failed to support any of the elements necessary or required [203] in a proceeding to set aside an alleged voidable preferential transfer.

X.

That the Referee erred in making said Order to the prejudice of petitioner for review in the following particulars:

(a) The findings of the Referee set forth in said Order are not supported by the evidence or any inference to be drawn therefrom and are contrary to the evidence.

(b) The findings of the Referee that the alleged transfer by the bankrupt herein to petitioner was made without consideration is contrary to the evidence in that it affirmatively shows that good, valuable, and present consideration was given by said petitioner for review to said bankrupt for and in consideration of the monies paid over to said petitioner.

(c) That it affirmatively appears from the record of the evidence introduced and received by the Referee that the said alleged transfer was made more than four months prior to the date of the commencement of the above entitled proceedings and that said Referee was without jurisdiction to make an Order against said petitioner directing said petitioner to turn over to the trustee the sum of

Two Thousand Five Hundred Thirty-Four and 76/100 ($2,534.76) Dollars or any other sum, or at all.

(d) That it does not appear from the evidence nor any of the pleadings filed herein nor from the Order of the Referee that the money received by said petitioner from Conway and Culligan depleted any estate of said bankrupt or any property which was available to the general unsecured creditors of said bankrupt.

(e) That it affirmatively appears from the record of the evidence introduced and received before the Referee in Bankruptcy upon the hearing that the said sum of Two Thousand Five Hundred Thirty-Four and 76/100 ($2,534.76) Dollars found by the Referee to be a part of the bankrupt estate was in truth and in fact the [204] property of said petitioner and held for the account of said petitioner by Conway and Culligan, the transferor of said funds, pursuant to a contract entered into by and between petitioner and Conway and Culligan more than four months prior to the filing of the bankrupt's petition wherein and whereby said Conway and Culligan agreed to pay to petitioner the said sum of Two Thousand Five Hundred Thirty-Four and 76/100 ($2,534.76) Dollars for and in consideration of materials delivered to said bankrupt.

(f) That it affirmatively appears from the records of the above entitled proceedings that any writings executed by and between the bankrupt, petitioner and/or Conway and Culligan within four

months prior to the filing of said Petition in Bankruptcy did not convey or transfer to petitioner any property belonging to said bankrupt and/or depleted any of his estate subject to administration by the above entitled Court.

(g) That it affirmatively appears from the evidence that the said petitioner was and is a secured creditor and that such security was obtained for a valuable consideration more than four months prior to the date of the commencement of the above entitled proceedings.

(h) That said Order of the Referee is contrary to evidence in that all of the legal evidence admitted or received before the Referee upon the hearing established without dispute that said bankrupt was solvent upon the date of the alleged transfer asserted by the trustee in his said petition.

(i) That said Order of the Referee is not supported by any evidence purporting to show that on the date upon which said alleged transfer was made to petitioner, and which is sought to be set aside by the trustee, that said bankrupt was insolvent within the meaning of the Bankruptcy Act.

(j) That said Order of the Referee is unsupported by any evidence to show that petitioner received a greater percentage of [205] its claim against said bankrupt than the other general unsecured creditors of the Bankrupt.

(k) That the said Order of the Referee is erroneous in that the evidence affirmatively shows that said petitioner did not have knowledge or reasonable cause to believe that said bankrupt was insolvent on the date the trustee alleges said transfer was made.

Wherefore, your petitioner, feeling aggrieved as aforesaid because of said Order of the Referee, prays that same may be reviewed by the Judge as provided for in the Bankruptcy Act of 1898 as amended and that the transcript of testimony and exhibits received by the Referee upon said hearing be certified and transmitted to the Judge of the above entitled Court.

That the said Order of the Referee be reversed.

That the judge make such further and other Order or Orders in the premises as may be meet and proper.

H. E. CASEY COMPANY

.....

Petitioner

HUGH F. MULLIN JR.

ERNEST J. TORREGANO

Attorneys for Petitioner [206]

United States of America
Northern District of California
County of San Mateo—ss.

H. E. Casey, being first duly sworn, deposes and says:

That he is one of the partners of H. E. Casey Company, a co-partnership, the petitioner for review herein; that he makes this verification for and on behalf of said co-partnership; that he has read said Petition for Review, knows the contents thereof and hereby makes solemn oath that the statements therein contained are true, according to his best knowledge, information and belief.

H. E. CASEY [207]

EXHIBIT "A"

In the Southern Division of the United States District Court for the Northern District of California

No. 34909-S

In Bankruptcy

In the Matter of

JOSEPH LOUIS SCARDINO

Bankrupt.

ORDER DIRECTING SAN MATEO FEED AND FUEL CO. AND H. E. CASEY COMPANY TO TURN OVER CERTAIN MONEYS TO TRUSTEE

Whereas, the matters involved herein came before the Court on the petition of G. S. Hayward, the trustee of the estate of the above-named bankrupt, represented by Max H. Margolis, Esq., the order to show cause based upon said petition, the answer of San Mateo Feed and Fuel Co., a corporation, represented by F. E. Hoffman, Esq., the answer of H. E. Casey Company, a copartnership, represented by Hugh [208] F. Mullins, Jr., Esq., the evidence taken upon the original hearing and the further hearing on said petition, order to show cause, and said answers to said petition and order to show cause, and

Whereas, the record herein, particularly schedule A-3 of the bankrupt, shows that the following creditors are listed as those whose claims are unsecured: State Compensation Ins. Fund, 445 Mc-

Allister Street, San Francisco, California, 1940 and 1941 (San Francisco Municipal Court action number 162,430)—$344.30; Industrial Indemnity Co., San Francisco, California, 11/6 to 12/6-41—$74.80; Industrial Indemnity Co., San Francisco, California, 12/6 to 1/6-42—$59.12; Blake-Moffitt-Towne Paper Co., 599 Eighth Street, San Francisco—$74.00; Markus Cut-Rate Hardware, Seventh & Washington Sts., Oakland—$331.00; Frank Peri, 920 South Idaho, San Mateo, California—$900.00, and Sequoia Grocery Market, 2525 Broadway, Redwood City, California—$75.00, and

Whereas, after the aforesaid hearings, the matters were submitted, and the court, now being advised fully in the premises, finds that:

(1) On April 29, 1942, the above-named bankrupt's petition for adjudication in bankruptcy was filed herein;

(2) On May 21, 1942, G. S. Hayward became, ever since has been, and now is the duly appointed, qualified and acting trustee of the above-named bankrupt's estate;

(3) On said date of said filing of said petition, as hereinbefore set forth, said bankrupt had assets, among them being the sum of $2,534.76, assigned to H. E. Casey Company, and the sum of $1,025.35 assigned to San Mateo Feed and Fuel Co.;

(4) Said assignments were, and each of them was, made by said bankrupt to the respective assignees within four months of the filing of the bankrupt's petition to be adjudicated a bankrupt,

and said assignments were, and each of them was, without any consideration therefor;

(5) At the time of the making of said assignment by the [209] bankrupt to said H. E. Casey Company, said bankrupt was insolvent, and, at said time, said H. E. Casey Company had reasonable cause to believe that said bankrupt was insolvent;

(6) At the time of the making of said assignment by the bankrupt to said San Mateo Feed and Fuel Co., said bankrupt was insolvent, and, at said time, said San Mateo Feed & Fuel Co. had reasonable cause to believe that said bankrupt was insolvent;

(7) When said assignment was made to said H. E. Casey Company the estate of said bankrupt was, and still is, depleted to the extent of $2,534.76;

(8) When said assignment was made to said San Mateo Feed and Fuel Co., the estate of said bankrupt was, and still is, depleted to the further extent of $1,025.35;

(9) By said assignment by said bankrupt to said H. E. Casey Company said last mentioned company secured an undue advantage over other creditors of the same class who, like said last mentioned company and said San Mateo Feed and Fuel Co. were, and are, unsecured creditors of said bankrupt;

(10) By said assignment by said bankrupt to said San Mateo Feed and Fuel Co., said last mentioned company secured an undue advantage over other creditors of the same class who, like said H. E. Casey Company were, and now are, unsecured creditors of said bankrupt;

(11) Upon the filing of said petition for said adjudication in said bankruptcy, each of the aforesaid sums, which in fact and in law was held in trust by the respective assignees for the benefit of the estate of said bankrupt and all the creditors thereof, passed into the custody of the bankruptcy court, and, upon the appointment and qualification of the aforesaid trustee in bankruptcy, passed to said last mentioned trustee to be administered herein as a part of the estate of said bankrupt;

(12) Said H. E. Casey Company is holding said sum of $2,534.76 without color or right of title thereto or any part there- [210] of, except as a de facto trustee for the estate of said bankrupt and all the creditors thereof, and

(13) Said San Mateo Feed and Fuel Co. is holding said sum of $1,025.35 without color or right of title thereto and/or any part thereof, except as a de facto trustee for the estate of said bankrupt and all the creditors thereof.

The court, therefore, concludes as matters of law that:

(1) Said trustee in Bankruptcy, G. S. Hayward, is entitled to have turned over to the estate of said bankrupt the sum of $2,534.76 from said H. E. Casey Company and that said last mentioned company should forthwith turn over to said last mentioned trustee in bankruptcy said sum of $2,534.76, and

(2) Said trustee in bankrupt, G. S. Hayward, is entitled to have turned over to the estate of said bankrupt the sum of $1,025.35 by said San Mateo

Feed and Fuel Co., and said last mentioned company should forthwith turn over to said last mentioned trustee in bankruptcy said sum of $1,025.35;

It Hereby Is Ordered, Adjudged and Decreed that:

(1) H. E. Casey Company forthwith turn over to G. S. Hayward, as the duly appointed, qualified and acting trustee of the estate of the above-named bankrupt the sum of $2,534.76, and the whole thereof, and

(2) San Mateo Feed and Fuel Co. forthwith turn over to G. S. Hayward, as the duly appointed qualified and acting trustee of the estate of the above-named bankrupt the sum of $1,025.35, and the whole thereof.

Dated: December 27, 1943.

BURTON J. WYMAN
Referee in Bankruptcy

[Endorsed]: Filed with Referee Feb. 25, 1944.

[Endorsed]: Filed with Clerk Jul. 20, 1944.

[211]

In the United States District Court, for the Northern District of California, Southern Division

No. 34909-S

In the Matter of

JOSEPH LOUIS SCARDINO,

Bankrupt.

ORDER CONFIRMING PROCEEDINGS AND FINDINGS OF REFEREE

Ordered:

1. The proceedings and findings set forth in the Certificates and Reports of Referee on petition for review filed on behalf of H. E. Casey Company on February 25, 1944, and on petition for review filed on behalf of San Mateo Feed & Fuel Company on February 26, 1944, are approved and confirmed.

2. The order of the Referee dated December 27, 1943, requiring said petitioners to turn over to the trustee of the estate of the above-named bankrupt certain sums of money is hereby affirmed and adopted.

3. It appearing that there was no actual fraud on the part of petitioners in accepting the preferential payments complained of by the trustee, and it appearing that they have not filed creditors claims in said bankruptcy [212] proceeding, they will be permitted, if so advised, to file such claims within thirty days from the date hereof. Keppel v. Tiffin Savings Bank, 197 U. S. 356; Page v. Rogers, 211 U. S. 575; Hair v. Byars, 92 F. (2d) 684.

4. The record in the matter is returned to the Referee for further proceedings.

Dated: October 13, 1944.

A. F. ST. SURE
United States District Judge

[Endorsed]: Filed Oct. 13, 1944. [213]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS UNDER RULE 73(b)

Notice is hereby given that San Mateo Feed & Fuel Co., a corporation, and H. E. Casey Company, a copartnership, hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from that certain Order and Judgment made and entered in the above-entitled proceedings by the Honorable A. F. St. Sure, Judge of the above-entitled Court, on the 13th day of October, 1944, wherein and whereby said Court affirmed and adopted [214] the Order of Honorable Burton J. Wyman, Referee in Bankruptcy, dated December 27, 1943, directing Appellants to turn over certain moneys to G. S. Hayward, Trustee of the estate of the above-named Bankrupt, and returning to said Referee the aforesaid matter for further proceedings.

Dated at San Francisco, in said District, this 10th day of November, 1944.

SAN MATEO FEED & FUEL CO., a corporation,
By F. E. HOFFMANN
and
ARTHUR P. SHAPRO
Its Attorneys
H. E. CASEY COMPANY,
a copartnership,
By ERNEST J. TORREGANO
and
HUGH F. MULLIN, JR.
Its Attorneys
Appellants.

[Endorsed]: Filed Nov. 10, 1944. [215]

[Title of District Court and Cause.]

BOND ON APPEAL

Whereas, San Mateo Feed & Fuel Co., a corporation, and H. E. Casey Company, a copartnership, the Appellants in the above proceeding, have appealed to the United States Circuit Court of Appeals, for the Ninth Circuit, from an Order and Judgment made and entered on the 13th day of October, 1944, against said Appellants in said proceeding in the above-entitled Court in favor of G. S. Hayward, as Trustee of the estate of the Bankrupt above-named. [216]

Now, Therefore, in consideration of the premises, and of such appeal, American Surety Company of New York, a corporation, organized and existing under and by virtue of the laws of the State of New York, and authorized to transact a surety business in the State of California, does hereby undertake and promises on the part of said Appellants, that said Appellants will pay all costs of said appeal which may be awarded against them if said Judgment of said District Court is affirmed or if said appeal is dismissed, together with such costs as said Appellate Court may award if said Judgment is modified, not exceeding the sum of Two Hundred Fifty and no/100 ($250.00) Dollars, to which amount it acknowledges itself bound.

It Is Further Stipulated as a part of the foregoing bond that in case of the breach of any condition thereof, the above-named District Court may, upon notice of not less than ten (10) days to the undersigned surety, proceed summarily in said proceeding or suit to ascertain the amount which said surety is bound to pay on account of such breach, and return judgment therefor against said surety and award execution therefor.

Signed, sealed and dated this 9th day of November, 1944.

AMERICAN SURETY COMPANY OF NEW YORK

By L. T. PLATT
Res. Vice-Pres.

Attest:

[Seal] B. D. SPERRY
Resident Asst. Secretary.

Bond #903454-K

Premium $10.00 per annum. [217]

State of California
City and County of San Francisco—ss.

On this 9th day of November, in the year one thousand nine hundred and forty-four before me, Thomas A. Dougherty, a Notary Public in and for said City and County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared L. T. Platt and B. D. Sperry known to me to be the Resident Vice-President and Resident Assistant Secretary respectively of the American Surety Company of New York, the corporation described in and that executed the within and foregoing instrument, and known to me to be the persons who executed the said instrument on behalf of the said corporation, and they both duly acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office, in

the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] THOMAS A. DOUGHERTY

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires August 10, 1947.

[Endorsed]: Filed Nov. 10, 1944. [218]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL UNDER RULE 75 (a)

To the above-entitled Court, and to C. W. Calbreath, Esq., Clerk of said Court, and to G. S. Hayward, as Trustee of the Estate of the above-named Bankrupt, and to Max H. Margolis, Esq., her attorney:

Come now San Mateo Feed & Fuel Co., a corporation, and H. E. Casey Company, a copartnership, Appellants herein, and, in accordance with Rule 75(a) of the Federal Rules of Civil Pro- [219] cedure, designate the following as the portions of the record, proceedings and evidence to be contained in the Record on Appeal, notice of which said Appeal was heretofore filed herein on the 10th day of November, 1944, viz:

1. Order of Adjudication.

2. Trustee's Petition for Turnover Order and Order to Show Cause issued thereon, dated April 2, 1943.

3. Answer of H. E. Casey Company to said Petition for Turnover Order.

4. Answer of San Mateo Feed & Fuel Co. to said Petition for Turnover Order.

5. Order on Petition of Trustee and Order to Show Cause based thereon, dated September 15, 1943.

6. Certificate and Report of Referee on Petition for Review of Referee's Order of September 15, 1943, (which includes said Petition for Review and the Affidavit of Bankrupt, dated September 23, 1943, in support thereof).

7. Order of District Judge, made on October 4, 1943, upon said Referee's Certificate and Report on Petition for Review of Referee's Order of September 15, 1943.

8. Notice of further hearing of Trustee's Petition for a Turnover Order, dated November 8, 1943.

9. Order (of Referee) directing San Mateo Feed & Fuel Co. and H. E. Casey Company to turn over certain moneys to Trustee, dated December 27, 1943.

10. Certificate and Report of Referee on Petition for Review filed on behalf of San Mateo Feed & Fuel Co. on February 26, 1944, (which includes a transcript of all the evidence adduced before said Referee upon said Trustee's Petition for Turnover Order at both the original and at the further hearing thereof, together with the said Petition for Review filed [220] February 26, 1944.

11. Petition for Review (of Referee's Order of December 27, 1943) filed by H. E. Casey Company, a copartnership, on February 25, 1944.

12. Order Confirming Proceedings and Findings of Referee (made by District Judge), dated October 13, 1944.

13. Trustee's Exhibit No. 1, dated April 2, 1943.

14. (Appellants') Notice of Appeal, dated November 10, 1944.

15. (Appellants') Bond on Appeal.

16. This Designation of Contents of Record on Appeal.

Dated: November 17, 1944.

Respectfully submitted,

F. E. HOFFMANN

and

ARTHUR P. SHAPRO

Attorneys for Appellant, San Mateo Feed & Fuel Co., a corporation

HUGH F. MULLIN, JR.

and

ERNEST J. TORREGANO

Attorneys for Appellant, H. E. Casey Company, a copartnership.

[Endorsed]: Filed Nov. 17, 1944. [221]

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD ON APPEAL UNDER RULE 75(a)

To the Above Entitled Court, and to C. W. Calbreath, Esq., Clerk of Said Court, and to F. E. Hoffman and Arthur P. Shapro. Esqs., Attorneys for Appellant, San Mateo *Feel* & Fuel Company, and to Hugh F. Mullin, Jr. and Ernest J. Torregano, Esqs., Attorneys for Appellant H. E. Casey Company:

Comes now G. S. Hayward, Trustee of the estate of Joseph Louis Scardino, the Bankrupt above named, Appellee herein, and, in accordance with Rule 75 (a) of the Federal Rules of Civil Procedure and designates the following as the portions of the record, [222] proceedings and evidence to be contained in the Record on Appeal notice of which said appeal has heretofore been filed by appellants on the 10th day of November, 1944, as follows:

1. Reporter's Transcript of Examination Under 21(a) which is a portion of Number 6 of Appellant's Designation of Contents of Record on Appeal under Rule 75(a) and which said Reporter's Transcript is a portion of the Record handed up with the Certificate and Report of Referee on Petition for Review of Referee's Order of September 15, 1943;

2. This designation of additional portions of the Record on Appeal dated November 27, 1944.

Respectfully submitted,

MAX H. MARGOLIS

Attorney for Trustee

Receipt of a copy of the foregoing Appellee's Designation of Additional Portions of the Record on Appeal under Rule 75(a) is hereby acknowledged this 27th day of November, 1944.

F. E. HOFFMAN

ARTHUR P. SHAPRO

Attorneys for Appellant, San Mateo Feed and Fuel Co., a corporation

HUGH F. MULLIN, JR.

ERNEST J. TORREGANO

Attorneys for Appellant H. E. Casey Company, a copartnership.

[Endorsed]: Filed Nov. 28, 1944. [223]

District Court of the United States,
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing pages, numbered from 1 to 223, inclusive, contain a full, true, and correct transcript of the records

and proceedings in the matter of Joseph Louis Scardino, Bankrupt, No. 34909 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Thirty-two and 40/100 Dollars and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 15th day of December, A. D. 1944.

[Seal] C. W. CALBREATH
Clerk
E. H. NORMAN
Deputy Clerk [224]

[Endorsed]: No. 10943. United States Circuit Court of Appeals for the Ninth Circuit. San Mateo Feed & Fuel Company, a corporation, and H. E. Casey Company, a copartnership, Appellants, vs. G. S. Hayward, as Trustee in the Matter of Joseph Louis Scardino, Bankrupt, Appellee. Transcript of record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed December 15, 1944.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10943

SAN MATEO FEED & FUEL CO., a corporation, and H. E. CASEY COMPANY, a copartnership,

Appellants,

vs.

G. S. HAYWARD, Trustee of the Estate of JOSEPH LOUIS SCARDINO, Bankrupt,

Appellee.

CONCISE STATEMENT OF POINTS TO BE RELIED UPON BY APPELLANTS ON APPEAL UNDER RULE 19(6)

Come now San Mateo Feed & Fuel Co., a corporation, and H. E. Casey Company, a copartnership, Appellants herein, and in accordance with Rule 19(6) of the above-entitled Court specify the following as a concise statement of the points on which said Appellants intend to rely on the Appeal heretofore perfected from the Order made and entered by Hon. A. F. St. Sure, Judge of the United States District Court for the Northern District of California, on the 13th day of October, 1944, and more particularly specified and described in the Notice heretofore filed with the Clerk of said District Court on the 10th day of November, 1944, viz:

That that Order of the District Judge entered on

the 13th day of October, 1944, by which he confirmed and approved the Order of the Referee in Bankruptcy herein made on the 27th day of December, 1943, wherein and whereby Appellants, San Mateo Feed & Fuel Co., a corporation, and H. E. Casey Company, a copartnership, were respectively directed to turn over to Appellee the respective sums of $1025.35 and $2534.76 was and is erroneous and contrary to law, in that:

(a) The said Order herein appealed from is not supported by and is contrary to the evidence adduced by Appellants and by Appellee upon the hearing and upon the further hearing of said Appellee's Petition for Turnover Order (filed April 2, 1943).

(b) That the Findings of said Referee contained in his said Order dated December 27, 1943, to wit: Findings numbered (3), (4), (6), (8), (10), (11) and (13) thereof, are not supported by and are contrary to the evidence adduced by Appellants and by said Appellee upon the aforesaid hearing and further hearing of said Trustee's Petition for Turnover Order.

(c) That said Trustee's Petition for Turnover Order (filed April 2, 1943) does not state facts sufficient to warrant the granting by said District Court to Appellee of the relief therein prayed for and/or the relief granted to Appellee by said Referee's Order dated December 27, 1943.

(d) That said Referee improperly received and considered as evidence against Appellants, upon the said hearing and further hearing of said Petition for Turnover Order all of the records of the bank-

ruptcy proceeding, including the Bankrupt's Schedule and the Ex Parte Affidavit filed by the Bankrupt in support of the Trustee's Petition for Review of said Referee's original Order (dated September 15, 1943) made upon said Petition for Turnover Order, in that both said Schedule and said Affidavit were not binding and constituted hearsay as against Appellants.

(e) That all of the evidence adduced upon the said hearing and further hearing of said Petition for Turnover Order was insufficient to warrant the District Court in granting to Appellee the relief contained in said Referee's Order dated December 27, 1943.

(f) That the evidence adduced upon said hearing and further hearing upon said Petition for Turnover Order shows affirmatively, and contrary to the Findings of said Referee contained in said Order dated December 27, 1943, that the assignment of said respective sums of $1025.35 and $2534.76 to Appellants by the Bankrupt was made more than four months prior to the commencement of said bankruptcy proceedings and was made for a present valuable and adequate consideration; and that even if made within said four months period, said assignment was then made to Appellants for a current valuable and adequate consideration.

(g) That it affirmatively appears from the evidence adduced upon said hearing and further hearing upon said Petition for Turnover Order, and contrary to the Findings of said Referee contained in his said Order dated December 27, 1943, that in

and by the aforesaid assignments of the aggregate sum of $3560.11 to Appellants said Bankrupt's estate was not depleted to that extent, or at all, and that said assignment did not enable Appellants to secure an undue advantage over other creditors of said Bankrupt of the same class; and more particularly, that Appellants were at all of the times herein mentioned secured rather than unsecured creditors of said Bankrupt.

(h) That it does not appear from the evidence adduced upon the said hearing and further hearing of said Petition for Turnover Order, nor is it a fact that at the time of the making of said assignment of said aggregate sum of $3560.11 to Appellants by said Bankrupt, said Bankrupt was then and there insolvent nor that Appellants, or either of them, then had reasonable cause to believe that said Bankrupt was insolvent.

(i) That it does not appear from the evidence adduced upon the said hearing and further hearing of said Petition for Turnover Order, that the assets in the hands of the Appellee were insufficient to pay in full all of the claims of creditors filed, approved and allowed against said Bankrupt's estate.

Dated at San Francisco, California, this 15th day of December, 1944.

F. E. HOFFMANN
and
ARTHUR P. SHAPRO
Attorneys for Appellant, San Mateo Feed & Fuel Co., a corporation

HUGH F. MULLINS, JR.
and
ERNEST J. TORREGANO
Attorneys for Appellant, H. E. Casey Company, a copartnership.

Receipt of copy of the within document is hereby admitted this 28th day of Dec., 1944.

MAX H. MARGOLIS OK
Attorney for Appellee

[Endorsed]: Filed Dec. 28, 1944. Paul P. O'Brien, Clerk.

No. 10,943

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SAN MATEO FEED & FUEL COMPANY (a corporation), and H. E. CASEY COMPANY (a copartnership),

Appellants,

vs.

G. S. HAYWARD, as Trustee in the Matter of Joseph Louis Scardino, Bankrupt,

Appellee.

APPELLANTS' OPENING BRIEF.

F. E. HOFFMANN,
231 Second Avenue, San Mateo, California,
ARTHUR P. SHAPRO,
420 Russ Building, San Francisco, California,
Attorneys for Appellant
San Mateo Feed & Fuel Company.

HUGH F. MULLIN, JR.,
220 Third Avenue, San Mateo, California,
ERNEST J. TORREGANO,
988 Mills Building, San Francisco, California,
Attorneys for Appellant
H. E. Casey Company.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes and Texts

No. 10,943

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SAN MATEO FEED & FUEL COMPANY (a corporation), and H. E. CASEY COMPANY (a copartnership),

Appellants,

vs.

G. S. HAYWARD, as Trustee in the Matter of Joseph Louis Scardino, Bankrupt,

Appellee.

APPELLANTS' OPENING BRIEF.

JURISDICTION.

This is an appeal by appellants, San Mateo Feed & Fuel Co., a corporation, and H. E. Casey Company, a copartnership, from an order (Tr. 250) of the Honorable A. F. St. Sure, one of the judges of the U. S. District Court for the Northern District of California, Southern Division, affirming upon review, an order of Honorable Burton J. Wyman, Referee in Bankruptcy, directing appellants H. E. Casey Company to turn over the sum of $2534.76 and San Mateo Feed & Fuel Co., a corporation, the sum of $1025.35 respec-

tively to G. S. Hayward, Trustee of the estate of Joseph Louis Scardino, Bankrupt. (Tr. 230.)

The District Court had jurisdiction under Section 2-a (15) of the Bankruptcy Act. The appeal is taken to this Court under Section 24 of the Bankruptcy Act.

STATEMENT OF THE CASE.

(a) The appeal.

The trustee, appellee herein, filed on April 2, 1943, with the Referee in Bankruptcy in the Court below her verified petition alleging that the respective amounts which appellants were ordered by the Referee to turn over to her were assets of the bankrupt estate and that the sums of money were assigned by the bankrupt to appellants within four months of the bankruptcy proceedings without consideration; that appellants knew the bankrupt was insolvent; that the moneys so received by respondents, appellants herein, were held by them without color or right. (Tr. 16.)

The Referee issued, pursuant to said trustee's petition, an order to show cause. (Tr. 19.) Respondents filed their answers. (Tr. 20-23.)

After a hearing, the Referee, on September 15, 1943, made and filed an order dismissing the trustee's petition without prejudice to said trustee within ten days thereof taking such further steps as she may be advised by virtue of the provisions of Section 70-e of the Bankruptcy Act. (Tr. 26.)

Thereafter the trustee filed a petition to review the Referee's order accompanied by an affidavit of the bankrupt and, pursuant to the petition for review, the Referee then sent up to the District Judge his certificate recommending that the judge return the records to him for further proceedings. (Tr. 3.)

On October 4, 1943, the District Judge ordered the records returned to the Referee. (Tr. 57.)

On November 8, 1943, a notice of a further hearing on the trustee's petition for a turn-over order directed to respondents, appellants herein, to be held on November 22, 1943 at 2 o'clock P.M., was filed. (Tr. 234.)

On December 27, 1943 the Referee made and filed his order directing appellants to turn over to the trustee the sums of $2534.76 by H. E. Casey Company and $1025.35 by San Mateo Feed & Fuel Co. upon the grounds stated in said order. (Tr. 239.)

On February 25, 1944 appellant H. E. Casey Company filed its petition for review. (Tr. 249.)

On February 26, 1944 appellant San Mateo Feed & Fuel Co. filed its petition for review. (See Referee's certificate.) (Tr. 226.)

On October 13, 1944 the District Judge made and entered an order confirming the proceedings and findings of the Referee. In said order the District Judge said:

> "It appearing that there was no actual fraud on the part of petitioners in accepting the preferential payments complained of by the trustee,

and it appearing that they have not filed creditors claims in said bankruptcy proceedings, they will be permitted, if so advised, to file such claims within thirty days from the date hereof." (Tr. 250.)

On November 10, 1944 appellants filed their notice of appeal (Tr. 251) and thereafter perfected same.

(b) The evidence.

The bankrupt was a plaster contractor and had certain building contracts with Conway & Culligan which required materials to be furnished (in addition to bankrupt's labor thereon). Appellants furnished the materials and Conway & Culligan, owners of the buildings which were being constructed and upon which the bankrupt was the plaster contractor, agreed to issue their checks payable jointly to the bankrupt and the material men furnishing the materials. (Tr. 155-7, 165, 184, 192.) Later their checks were issued directly to the material men including appellant, the reason being that the bankrupt had discontinued the work to be performed on his contract and, therefore, the contract had to be finished by someone else.

The bankrupt has had business transactions with appellant H. E. Casey Company ever since the year 1927 (Tr. 74) and also with appellant San Mateo Feed & Fuel Co. for many years prior to his bankruptcy.

During the hearing the bankrupt testified that he gave appellants the authority to collect the money due him from Conway & Culligan because he knew appel-

lants otherwise could lien the jobs and get it. (Tr. 77-8.)

ARGUMENT.

POINT 1.

(a) THE SAID ORDER HEREIN APPEALED FROM IS NOT SUPPORTED BY AND IS CONTRARY TO THE EVIDENCE ADDUCED BY APPELLANTS AND BY APPELLEE UPON THE HEARING AND UPON THE FURTHER HEARING OF SAID APPELLEE'S PETITION FOR TURNOVER ORDER (FILED APRIL 2, 1943).

In confirming the order of the Referee directing the appellants to turn over to the trustee the sums referred to in the Referee's order, the District Judge expressly recognized that appellants' transactions with the bankrupt were not fraudulent and consequently the appellants were not fraudulent transferees. However the order of the Referee and the findings therein contained, which are confirmed and adopted by the District Judge, to say the least are ambiguous for it cannot be ascertained therefrom whether the Referee intended to hold that appellants had obtained a fraudulent transfer of the bankrupt's assets without any consideration therefor and, therefore, was a trustee for the bankrupt at the time of the commencement of the bankruptcy proceedings, or whether appellants, and each of them, had obtained preferential transfers voidable under the provisions of the Bankruptcy Act.

In view of the District Judge's order and the language contained therein, we must assume that the Referee's proceedings were affirmed by the District

Judge upon the theory that voidable preferential transfers under the Bankruptcy Act had been proven against the appellants. The record, however, not only does not support any fraudulent transfers but likewise cannot support any voidable preferential transfers (as intimated in the Referee's ruling directing the turnover order to be entered against appellants) because the order of re-reference made by the District Judge on October 4, 1943 (Tr. 58), and the Referee's original order dismissing the trustee's petition (Tr. 27) in effect limited the "further hearing" to a proceeding under Sec. 70-e of the Bankruptcy Act.

POINT 2.

(b) THAT THE FINDINGS OF SAID REFEREE CONTAINED IN HIS SAID ORDER DATED DECEMBER 27, 1943, TO-WIT: FINDINGS NUMBERED (3), (4), (6), (8), (10), (11) AND (13) THEREOF, ARE NOT SUPPORTED BY AND ARE CONTRARY TO THE EVIDENCE ADDUCED BY APPELLANTS AND BY SAID APPELLEE UPON THE AFORESAID HEARING AND FURTHER HEARING OF SAID TRUSTEE'S PETITION FOR TURNOVER ORDER.

Being of the opinion, as we are, that the District Judge found that the record was void of any elements upon which a fraudulent transfer could be sustained, we must now approach a discussion of the District Judge's order upon the theory that he intended to affirm the Referee's proceedings, under the theory that the appellants had received voidable preferential transfers.

It is important, however, to observe that a preferential transfer requires certain elements to sustain

it. It is a statutory cause of action given under the Bankruptcy Act. The elements required to sustain a proceeding of a trustee in bankruptcy to set aside a voidable transfer alleged to have been obtained by a creditor are as follows:

1st Element. A transfer on an antecedent indebtedness;

2nd Element. A transfer made by an insolvent debtor.

3rd Element. A transfer made within four (4) months before bankruptcy;

4th Element. A transfer resulting in an advantage to a creditor, that is to say, a transfer that will enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

5th Element. Reasonable cause for the creditor to believe the debtor is insolvent.

Therefore whenever the term "voidable preference" is used in a proceeding to recover such voidable preference, it means the transaction has all five (5) elements or the characteristics above mentioned. If any of these elements are missing, either in pleading or proof, the transaction cannot result in the recovery by the trustee of a voidable preference under the Bankruptcy Act.

Proof of the first element must be entirely discarded for the reason that the record affirmatively shows that the checks made payable jointly to the bankrupt and to the material men were for a present considera-

tion, to-wit: the furnishing of material at the time the agreement was made for the completion of the construction of the premises being constructed by Conway & Culligan. (Tr. 152.) The failure to sustain the first element of proof required necessarily negatives the proof of the third element for the reason that if a transfer is made for a present consideration, even though it be within four (4) months period, it is not voidable. And proof of the fourth element is also wanting for the reason that if the transfer is made for a present consideration, there is no advantage to the creditor thus contracting with the bankrupt for payment, nor does it place such creditor in the category of the holder of an antecedent indebtedness. With respect to "Reasonable cause to believe" (the fifth element) although obviously essential, the record uncontradictorily discloses a denial upon the part of the Court below of the appellants' offer to produce such proof which would negative the existence of such fifth element even though the trustee originally was required to assume the burden of proof. (Tr. 109-112.)

> "The burden of proving such knowledge or such facts as would put a reasonable man upon inquiry rested upon the trustee. That burden was not here sustained."
>
> *Closson v. Newberry's Hdw. Co.,* 283 Fed. 33.

> "The burden of proof is on the complainant and unless he shows by sufficient evidence the element of a voidable preference, he is not entitled to recover. He must prove that the bankrupt (1) while insolvent, (2) within four months of the bankruptcy, (3) made his transfer of the prop-

erty, e.g., a payment of money, (4) and that the creditor receiving the payment was thereby enabled to obtain a greater percentage of his debt than other creditors of the same class; and it must also be proved, (5) that the person receiving the payment or to be benefited thereby, had reasonable cause to believe that it was thereby intended to give a preference."

Tumlin v. Bryan, 165 Fed. 166.

"We have searched the record diligently for evidence bearing upon this item of $33,526.94 with special reference to the record pages to which we have been directed by the briefs, and being always mindful that the trustee bore the burden of establishing a voidable preference, we have not been able to find anything substantial to support the trustee's position. We have discovered isolated bits of evidence tending very strongly to show that this money arose from the sale of cars impresed with a lien in favor of C.C.T. as contended by it but little to support the trustee except his theory. In this state of the record we think the trustee failed to carry the burden on this item."

Larkin v. Welch (C. C. A., 7th Cir.), 86 Fed. (2d) 442.

POINT 3.

(c) THAT SAID TRUSTEE'S PETITION FOR TURNOVER ORDER (FILED APRIL 2, 1943) DOES NOT STATE FACTS SUFFICIENT TO WARRANT THE GRANTING BY SAID DISTRICT COURT TO APPELLEE OF THE RELIEF THEREIN PRAYED FOR AND/OR THE RELIEF GRANTED TO APPELLEE BY SAID REFEREE'S ORDER DATED DECEMBER 27, 1943.

The Trustee's Petition for Turnover Order (Tr. 16) does not contain any allegations of the first, second, or fourth essential elements of a voidable preference. This clearly shows that the appellee's theory of this case, as so pleaded, was founded on the "fraudulent conveyance" (without payment of consideration) theory rather than on the "voidable preference" theory. Some of these defects in the trustee's pleading and proof, the Referee, in his Findings (for the first time) endeavored to remedy. (Findings Nos. (5), (6), (9), and (10).) (Tr. 236-7.) But even the Referee omitted therefrom a finding on the first essential element of a preference, i.e., that appellants' claims were founded on an "antecedent indebtedness".

Also great reliance is placed by the Trustee upon the so-called Trustee's Exhibit No. 1 (Tr. 41) as being proof by him of an assignment made within four (4) months. However the record taken in its entirety does not bear out such construction. Any letter of instruction or document given by the bankrupt or anyone else for him which places a creditor in possession of assets of the debtor which already belong to him by reason of the transaction occurring more than four (4) months before bankruptcy, does not create an assignment within the meaning of the Act. There is

no depletion of the estate; the creditor when he received such property of the debtor received only what he is already entitled to receive. (Tr. 150-152.)

POINT 4.

(d) THAT SAID REFEREE IMPROPERLY RECEIVED AND CONSIDERED AS EVIDENCE AGAINST APPELLANTS, UPON THE SAID HEARING AND FURTHER HEARING OF SAID PETITION FOR TURNOVER ORDER ALL OF THE RECORDS OF THE BANKRUPTCY PROCEEDING, INCLUDING THE BANKRUPT'S SCHEDULE AND THE EX PARTE AFFIDAVIT FILED BY THE BANKRUPT IN SUPPORT OF THE TRUSTEE'S PETITION FOR REVIEW OF SAID REFEREE'S ORIGINAL ORDER (DATED SEPTEMBER 15, 1943) MADE UPON SAID PETITION FOR TURNOVER ORDER, IN THAT BOTH SAID SCHEDULE AND SAID AFFIDAVIT WERE NOT BINDING UPON AND CONSTITUTED HEARSAY AS AGAINST APPELLANTS.

Contrary to the Referee's belief, as expressed by him during the hearing, the rule of evidence in a trial of a preferential transfer is no different than any other triable issue. Any evidence competent to enable the lower Court to properly determine whether the fifth element existed should have been received and considered; instead, however, the Referee arbitrarily declined to do so stating that it makes no difference as to what the course of business dealings had been prior to bankruptcy but that if the transaction occurred within four (4) months of bankruptcy, that appeared to be the end of it. (Tr. 76; 90-93.)

The learned authority of *Remington,* 4th Ed. states the rule upon a question of determining a preferential transfer and the admissibility of evidence to be as follows, "and the admissibility of the evidence is to

be determined by the usual rules." *Remington,* 4th Ed., Sec. 2301, page 450.

> "The burden of proof is usually on the plaintiff. This is peculiarly true where it is asserted that in bankruptcy a preference has been made. The legality of the evidence offered to sustain this burden must of course be determined by the usual rules."
>
> *Rosenman v. Coppard,* 228 Fed. 114.

In *Remington,* 4th Ed., Sec. 2260, the author states:

> "The schedules of the bankrupt are inadmissible against a transferee. They are not his admission. Likewise a general examination of the bankrupt is inadmissible." (See cases cited thereat.)

In a case almost similar to the instant case, the Court stated:

> "These schedules and part of the evidence so given by him in the bankruptcy proceedings were offered in evidence by the plaintiff upon the trial for the purpose of establishing the insolvency of the said Nichols at that time. To this offer the defendant objected, that as to him they were hearsay and that he was not bound by these declarations. The objections were overruled, the evidence was admitted, and the defendant excepted to the ruling. We are unable to see upon what ground this evidence was competent. It was the declaration of a bankrupt in a proceeding in which it does not appear that this defendant was a party. As to this defendant the evidence would seem clearly to be hearsay and inadmissible."
>
> *Taylor v. Nichols,* 134 App. Div. 787, 119 N. Y. Supp. 1042, 23 A. B. R. 310.

POINT 5.

(e) THAT ALL OF THE EVIDENCE ADDUCED UPON THE SAID HEARING AND FURTHER HEARING OF SAID PETITION FOR TURNOVER ORDER WAS INSUFFICIENT TO WARRANT THE DISTRICT COURT IN GRANTING TO APPELLEE THE RELIEF CONTAINED IN SAID REFEREE'S ORDER DATED DECEMBER 27, 1943.

Great reliance is placed by the Trustee upon the so-called Trustee's Exhibit No. 1 as being proof by him of an assignment made within four (4) months, which is referred to in our discussion under Point 3. If the lower Court had accepted the offer of proof as tendered by appellants, the evidence would have clearly supported appellants' contention under the point urged above.

"Mr. Mullin. Q. Well, it was quite common, was it not, for the credit managers, both of the San Mateo Feed & Fuel Company and H. E. Casey Company, to come and call on you for payments over a period of years?

A. Not as early as I started business. After about a year or so, they used to come often.

Q. From 1938 on?

A. Just about '38, and as a matter of fact, as I say before, I complained at that time that they should not do that. They went to the general contractor and tell them don't make the check on my name alone, make a joint check whenever payments are coming, either the first or second account.

Q. It was quite common for you in your business, from 1938 on at least, to have checks from the general contractor to you as subcontractor, to be made payable jointly to you and the material house who supplied you sand, plaster, or the materials used?

A. I did not sign anything. They got it without my authority. They tell the general contractor whenever they make a check to Scardino, don't make it to his name alone.

Q. You knew that at the time?

A. I knew it was done. I went to Mr. Casey and complained about it. I went to the bookkeeper and all. Mr. Casey knew that, too. I went in the office.

Q. You continued buying merchandise?

A. Yes.

Q. And it was also quite common with you to get assignments, authorized assignments, from the general contractor to make payments to your material men, was it not?

Mr. Margolis. Objected to on the ground that it is argumentative. It is not material whether or not he gave assignments heretofore.

Mr. Mullin. If the Court please, I propose to show an established custom and practice with this bankrupt in his business over a period of years.

The Referee. Why would that make a difference, if it was done within four months and violated the Bankruptcy Act?

Mr. Mullin. Your Honor, my understanding of the Bankruptcy Act may not be correct, but my understanding is, that any assignment that has been taken in good faith for adequate consideration is a good assignment, although made within four months.

The Referee. Well, you can show that each one you have here was for adequate consideration, but the fact that it went on over a number of years would not mean that one might be absolutely valid and the next one not.

Mr. Mullin. Unfortunately, Your Honor, in presenting proof you cannot offer it all at once. But I ask to establish a custom with this man.

The Referee. In face of the objection, that is not good.

Mr. Mullin. For the purpose of the record in the matter, I would like the record to show that H. E. Casey Company makes an offer to prove, to show that the practice of assignments had been common with the bankrupt and with others during all the period of years prior to the filing of this bankruptcy.

The Referee. That may go in the record."

(Tr. 74-75-76.)

The learned authority of *Remington,* 4th Ed., states the rule upon a question of determining a preferential transfer and the admissibility of evidence to be as follows, "and the admissibility of the evidence is to be determined by the usual rules." *Remington,* 4th Ed., Sec. 2301, page 450.

POINT 6.

(f) THAT THE EVIDENCE ADDUCED UPON SAID HEARING AND FURTHER HEARING UPON SAID PETITION FOR TURNOVER ORDER SHOWS AFFIRMATIVELY, AND CONTRARY TO THE FINDINGS OF SAID REFEREE CONTAINED IN SAID ORDER DATED DECEMBER 27, 1943, THAT THE ASSIGNMENT OF SAID RESPECTIVE SUMS OF $1025.35 AND $2534.76 TO APPELLANTS BY THE BANKRUPT WAS MADE MORE THAN FOUR MONTHS PRIOR TO THE COMMENCEMENT OF SAID BANKRUPTCY PROCEEDINGS AND WAS MADE FOR A PRESENT VALUABLE AND ADEQUATE CONSIDERATION; AND THAT EVEN IF MADE WITHIN SAID FOUR MONTHS' PERIOD, SAID ASSIGNMENT WAS THEN MADE TO APPELLANTS FOR A CURRENT VALUABLE AND ADEQUATE CONSIDERATION.

In view of the statements contained in the District Judge's order confirming the Referee's proceedings, we cite the following cases:

> "An attempt to prefer is not to be confounded with an attempt to defraud, nor a preferential transfer with a fraudulent one."
>
> *Githens v. Shiffler,* 112 Fed. 505.

> "In a preferential transfer the fraud is constructive or technical, consisting in the infraction of that rule of equal distribution among all creditors which it is the policy of the law to enforce when all cannot be fully paid. In a fraudulent transfer *the fraud is actual*—the bankrupt has secured an advantage for himself out of what in law should belong to his creditors, and not to him." (Emphasis supplied.)
>
> *In re Maher,* 144 Fed. 503, at p. 505.

We desire to stress that there is a distinct importance here to the variance between the pleading and the proof, and the trustee's omission to properly plead

a preference becomes more apparent when it appears that the Referee's Finding No. (4) indicates that the "assignments" to the appellants by the bankrupt were made "without any consideration therefor" (Tr. 236), despite his other findings, and the clear import of the evidence in the record. If the letter of February 20, 1942 (Tr. 48-49), is to be construed as an assignment (which of course is disputed by appellants) it was made obviously for a good consideration and is unassailable in a bankruptcy proceeding for two reasons:

First, it was merely an order to carry out the original obligation of Conway & Culligan to pay the materialmen for materials furnished on their job and which were agreed to be paid to them at the time the materials were furnished (Tr. 159-160);

Second, even if the unpaid bills were antecedent debts, the payment of an antecedent debt is a good consideration within the meaning of Section 70-e. We are, of course, not unmindful that in the trial of a voidable preferential transfer properly pleaded and proved by the trustee if all the elements of a preference exist, the payment of an antecedent indebtedness may constitute a recoverable preference.

The appellants obviously were prejudiced by the change in theory of the trustee's case both in the presentation thereof and in the erroneous determination thereof by the Referee because the specific issues upon which the re-reference and rehearing was ordered were clearly limited to the fraudulent conveyance theory and not preferential transfers which invites an entirely different order of proof. And the prejudice

becomes more apparent when it is considered that at this eleventh hour of the trial when the preferential transfer theory was invoked and appellants undertook to meet it, they were denied such privilege by the Referee's ruling. (Tr. 74-75-76.)

POINT 7.

(g) THAT IT AFFIRMATIVELY APPEARS FROM THE EVIDENCE ADDUCED UPON SAID HEARING AND FURTHER HEARING UPON SAID PETITION FOR TURNOVER ORDER, AND CONTRARY TO THE FINDINGS OF SAID REFEREE CONTAINED IN HIS SAID ORDER DATED DECEMBER 27, 1943, THAT IN AND BY THE AFORESAID ASSIGNMENTS OF THE AGGREGATE SUM OF $3560.11 TO APPELLANTS SAID BANKRUPT'S ESTATE WAS NOT DEPLETED TO THAT EXTENT, OR AT ALL, AND THAT SAID ASSIGNMENT DID NOT ENABLE APPELLANTS TO SECURE AN UNDUE ADVANTAGE OVER OTHER CREDITORS OF SAID BANKRUPT OF THE SAME CLASS; AND MORE PARTICULARLY, THAT APPELLANTS WERE AT ALL OF THE TIMES HEREIN MENTIONED SECURED RATHER THAN UNSECURED CREDITORS OF SAID BANKRUPT.

As it has been repeatedly stated by the Courts and urged herein by appellants, the burden is upon the trustee to prove each and every element in order to sustain a cause of action to recover a voidable preference. *Remington,* 4th Ed. Sec. 2289, and cases cited thereat.

The bankrupt testified:

"Cross-Examination.

Mr. Hoffmann. Q. Mr. Scardino, you say that between December and April the San Mateo Feed & Fuel Company and the Casey Company asked

you to make checks payable jointly to themselves? That is, that your debtor make checks payable to San Mateo Feed & Fuel Company and yourself?

A. I signed an assignment, according to the last time the check was made to them.

Q. All right. Your response to the question of your counsel here is, that between December, 1941 and the date you went into bankruptcy in 1942, the San Mateo Feed & Fuel Company, for one, asked that the checks drawn for work that you had done be made payable jointly to themselves and you. Is that correct?

A. I don't know, because they were made long before.

Q. Sure. They had been made like that for three or four years before, hadn't they?

A. No, no.

Q. You testified earlier they were made like that in 1940 and 1941?

A. What?

Q. Joint checks?

A. The checks was made, I don't remember when it started jointly, because they went to the general contractors and told them to make the check jointly.

Q. When did they do that?

A. I don't know. Ask them.

Q. They had been doing it for a period of three or four years, hadn't they?

A. No, it was lately.

Q. They had been doing it in 1941?

A. Yes.

Q. Hadn't they?

A. Not all; not all the general contractors, several; one on the Schmidt, one on the Young, one

on another one. They told them don't make checks for the first payment to me; make joint.

Q. That had been going on for a year or so before?

A. No, not a year before; probably four months, six months, five months, whatever it was.

Q. Is it not the fact that Conway & Culligan started doing business with you that way in 1937?

A. Conway & Culligan is separate, because all Conway & Culligan checks, he was operating on that line without anybody asking.

Q. And had been since 1937?

A. He was doing it all the time. Not just with me, but every one of the sub-contractors.

Q. You never objected to that way of doing business?

A. Yes, I did.

Q. To whom?

A. Well, I told to the manager and collector they should not do, because they spoil my business, I get no credit from those general contractors any more.

Q. Did you ever make an objection to Mr. Culligan of that firm?

A. I don't remember. Before I started business, they told me they would not make checks any other way. That settled it." (Tr. 150-152.)

The above quoted evidence is only a portion of the record which discloses conclusively that the materialmen, when they delivered the material to the jobs of the bankrupt, obtained a right against Conway & Culligan by virtue of their contract that all checks would be made payable jointly to the bankrupt and the materialmen. Consequently when the materialmen

took that portion of the check which belonged to them based upon a present consideration, to wit: The furnishing of material for the jobs, there was no depletion of the estate and thus it has been held that the trustee must show a depletion of a bankrupt estate in order to sustain the element of a voidable preferential transfer.

Remington, 4th Ed. Sec. 2289.50;
Dwight v. Horn, 26 A.B.R. (N.S.) 269.

POINT 8.

(h) THAT IT DOES NOT APPEAR FROM THE EVIDENCE ADDUCED UPON THE SAID HEARING AND FURTHER HEARING OF SAID PETITION FOR TURNOVER ORDER, NOR IS IT A FACT THAT AT THE TIME OF THE MAKING OF SAID ASSIGNMENT OF SAID AGGREGATE SUM OF $3560.11 TO APPELLANTS BY SAID BANKRUPT, SAID BANKRUPT WAS THEN AND THERE INSOLVENT NOR THAT APPELLANTS, OR EITHER OF THEM, THEN HAD REASONABLE CAUSE TO BELIEVE THAT SAID BANKRUPT WAS INSOLVENT.

If the rule were to make the schedule admissible as contended for by the Trustee and the Referee, the truth and the accuracy of the bankrupt's schedules retroactive to the time of the transfer would be the only evidentiary matter upon which the finding of insolvency in this case is attempted to be predicated. The fact that schedules were filed by the bankrupt, if that were material, would be the proper subject of judicial notice by the Referee but not the content of the schedules; therefore this was clearly an error on the part of the Referee.

"That the schedules filed by the bankrupt are inadmissible against the alleged preferred creditor

> to prove the bankrupt's insolvency, being merely the admissions of an assignor after he has parted with his interest to the alleged preferred creditor;"
>
> *Remington on Bankruptcy,* 4th Ed., Vol. 5, Sec. 2291, P. 445.

See also

Clifton Merc. Co. v. Conway, 264 S.W. 192, 4 A.B.R. (N.S.) 1164,

and cases cited therein.

We cannot emphasize too strongly that a voidable preferential transfer is one based upon the specific provisions of the Bankruptcy Act giving a cause of action to a trustee in bankruptcy to recover same and, therefore, all the elements necessary to sustain such a statutory cause of action must exist and be proven by competent evidence. (Merely that the bankrupt was in failing circumstances and unable to meet his debts is insufficient, such allegation or proof not being the equivalent of proof of insolvency, but the trustee must prove the insolvency as of the date of the transfer.)

The only evidence in the record of the insolvency of the bankrupt is an ex parte affidavit of the bankrupt which is clearly not admissible and the schedule of the bankrupt which also is clearly not admissible since the schedule and the ex parte statement of the bankrupt are not binding upon a preferential transferee of the bankrupt, it being gross "hearsay" evidence.

The Referee, however, in his certificate to the District Judge, although calling attention to the error al-

leged by appellants in the receipt and consideration by him of the bankrupt's schedule and ex parte affidavit, asserts that the affidavit was used solely for one purpose, as part of the trustee's offer of proof mentioned in said trustee's petition for review.

The Referee makes no effort to support the admission of the schedule in the evidence but advises the District Judge in his certificate that the affidavit of the bankrupt was used only in cross-examination. This, however, is contrary to the record for the reason that the Referee clearly announced the rule which he invoked upon the hearing before him regarding the introduction of the schedule and the affidavit.

As to the admission of the affidavit as part of the proceedings on the rehearing, the record discloses the following:

> "Mr. Margolis. We will offer the affidavit in evidence, your Honor, and let it go at that." (Tr. 171.)
>
> "Mr. Margolis. I think counsel has in mind that it is set out by affiant in the affidavit that the only property he had was $50.00 at the time he filed, which was subject to attachment."
>
> "The Referee. That is not disputed. *But anything so far as the affidavit stands.*" (Emphasis ours.) (Tr. 179.)

While no express ruling on the admissibility of the affidavit appears to have been made by the Referee, it is obvious, from his statement, that no express ruling was necessary to indicate to the litigant that the affidavit as filed by the bankrupt was being considered by him. In fact, he so stated.

As to the schedule, in the preamble to the Referee's findings numbered in chronological order appears his specific reference to and a resume of the names of creditors and amounts appearing in schedule a-3 (Tr. 235) filed by the bankrupt. The vice in the consideration of such ex parte statement in the bankrupt's schedule in order to establish the existence of certain creditors is that in truth and in fact the exact date as to when these indebtednesses were incurred cannot be ascertained from such schedule, and, therefore, the only admissible evidence regarding the existence of such claims would be the direct testimony of the bankrupt or the creditors coupled with the right of cross-examination.

That the Referee considered the petition and schedules as part of the evidence to sustain his findings of insolvency is indicated by the following:

> "Mr. Margolis. We, therefore, ask at this time, if it please your Honor, that the petition and schedules be introduced in evidence and marked as a portion of the record, by designating it Trustee's Exhibit 'A'.
>
> The Referee. They are part of the record anyway.
>
> Mr. Margolis. Yes, but I would like to offer them in evidence, your Honor.
>
> The Referee. You don't have to do it. Under the Federal Rule, they are before the Court and the Court will take into consideration everything in the record." (Tr. 144.)

While the General Rule permits the Court to take judicial knowledge of the contents of the record be-

fore it, this doctrine is limited to the fact of actions by that Court in the instant or other proceedings before it, and obviously the mere filing of an affidavit or a schedule by the bankrupt some weeks after he is claimed to have made a preferential transfer could not help but be self-serving, and therefore not binding upon the transferee in an action brought to recover such preference.

POINT 9.

(i) THAT IT DOES NOT APPEAR FROM THE EVIDENCE ADDUCED UPON THE SAID HEARING AND FURTHER HEARING OF SAID PETITION FOR TURNOVER ORDER, THAT THE ASSETS IN THE HANDS OF THE APPELLEE WERE INSUFFICIENT TO PAY IN FULL ALL OF THE CLAIMS OF CREDITORS FILED, APPROVED, AND ALLOWED AGAINST SAID BANKRUPT'S ESTATE.

Again alluding to the fact that the trustee must prove each and every element required to prove a voidable preference, it follows that he is required to prove that the assets in his hand were insufficient to pay in full the claims of creditors filed, approved and allowed against said bankrupt's estate. The record is devoid of any such proof. The schedules themselves do not prove claims which are filed, approved and allowed against a bankrupt's estate but obviously the Referee, in arriving at his conclusion, merely took from the bankrupt's schedule the "hearsay" statement of the bankrupt as to claims against the estate and considered that as evidence against appellants in order to prove the *allowed claims* against the estate. (Tr. 245-6.) (Emphasis ours.)

CONCLUSION.

Upon the record as made in these proceedings we earnestly urge that the lower Court has erred in finding or determining that the appellants, or either of them, have received voidable preferential transfers recoverable under the provisions of the Bankruptcy Act and that the order of the District Judge confirming the Referee's order of December 27, 1943 should be reversed and the matter remanded to the District Court with directions to enter an order denying the trustee's petition for turnover order.

Dated, San Francisco, California,
April 4, 1945.

Respectfully submitted,
F. E. HOFFMANN,
ARTHUR P. SHAPRO,
Attorneys for Appellant
San Mateo Feed & Fuel Company.

HUGH F. MULLIN, JR.,
ERNEST J. TORREGANO,
Attorneys for Appellant
H. E. Casey Company.

No. 10,943

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

San Mateo Feed & Fuel Company (a corporation), and H. E. Casey Company (a copartnership),

Appellants,

vs.

G. S. Hayward, as Trustee in the Matter of Joseph Louis Scardino, Bankrupt,

Appellee.

BRIEF FOR APPELLEE.

Max H. Margolis,
Herbert Chamberlin,
Russ Building, San Francisco 4,
Attorneys for Appellee.

Pernau-Walsh Printing Co., San Francisco

Subject Index

Table of Authorities Cited

Cases

Statutes and Texts

No. 10,943

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SAN MATEO FEED & FUEL COMPANY (a corporation), and H. E. CASEY COMPANY (a copartnership),

Appellants,

vs.

G. S. HAYWARD, as Trustee in the Matter of Joseph Louis Scardino, Bankrupt,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF JURISDICTION.

The appellee petitioned the bankruptcy court for a turnover order against the appellant. (T. 16-18.) An order to show cause was issued by the Referee (T. 19-20), and each appellant appeared and answered to the merits (T. 20-26). Following the hearing, findings of fact, conclusions of law, and a turnover order were made and entered by the Referee. (T. 235-239.) Both appellants petitioned for review. (T. 226-230, 239-244.) Jurisdiction of the District Court is therefore sustained by section 2, subdivision a (10) (15), and sec-

tion 39, subdivision (c) of the Bankruptcy Act. (11 U.S.C.A., sec. 11, subd. a; 11 U.S.C.A., sec. 67, subd. (c).)

An order of the District Court was made and entered on October 13, 1944, approving and confirming the proceedings and findings of the Referee and affirming and adopting the order of the Referee. (T. 250-251.) Notice of appeal therefrom to this court was filed by the appellants on November 10, 1944. (T. 251-252.) Jurisdiction of this court upon appeal to review the said order of the District Court is therefore sustained by section 24, subdivisions a and b, of the Bankruptcy Act. (11 U.S.C.A., sec. 47, subds. a and b.)

STATEMENT OF THE CASE.

The appellee is trustee in bankruptcy of the estate of Joseph Louis Scardino (T. 29) who was adjudged a bankrupt on April 30, 1942 (T. 2-3). She invoked the summary jurisdiction of the bankruptcy court by certified petition for a turnover order against appellants on the ground that they had received voidable preferences. (T. 16-18.) In response to an order to show cause issued by the Referee on April 2, 1943 (T. 19-20) the appellants appeared and answered to the merits (T. 20-26).

Hearings were had on the petition commencing April 12, 1943 (T. 64), and on September 15, 1943, the Referee made an order dismissing the petition because he was of the opinion that the trustee had not estab-

lished the element of insolvency (T. 26-27). A petition for review was filed by the trustee in which she offered to prove all the elements essential to avoidable preference, including the element of insolvency. (T. 4-9.) An affidavit of the bankrupt in support of the offer of proof was made a part of the petition for review. (T. 8, 10-14.) After considering the petition and affidavit, the Referee recommended and requested that the record be remanded "with instructions to take such further proceedings as are warranted in the premises". (T. 14-15.) An order of the District Court was made on October 4, 1943, remanding the record to the Referee "for further proceedings in accordance with his request". (T. 57-58.) No appeal was taken from this order.

Commencing on November 22, 1943, "further hearing" on the petition for turnover order was had. (T. 143.) At no time did the appellants object to the sufficiency of the petition or the scope of the issues. The evidence before the Referee was conflicting. He was called upon to judge of the credibility of witnesses whose testimony he heard. It is enough to say at this point, however, that the evidence before the Referee was sufficient to establish all the elements of voidable preference as defined in section 60, subdivisions (a) and (b), of the Bankruptcy Act. (11 U.S.C.A., sec. 96, subds. (a) (b).) The pertinent parts thereof read:

> "(a) A preference is a transfer, as defined in this title, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such

> debtor while insolvent, and within four months before the filing by . . . him of the petition in bankruptcy . . . the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. * * *
>
> (b) Any such preference may be avoided by the trustee if the cdeditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent.''

On December 27, 1943, the Referee made his findings of fact and conclusions of law, and entered a turnover order against both appellants. (T. 235-239.) Each appellant duly petitioned for review. (T. 226-230, 239-244.) The order of the District Court approving and confirming the proceedings and findings of the Referee, and affirming and adopting the turnover order, was made on October 13, 1944.

Comment is necessary on the form of appellants' opening brief. It contains no specification of errors as required by Rule 20, subdivision 2 (d) of this Court. Appellants merely present ''points'' as they stated them in their ''Concise Statement'' under Rule 19, subdivision 6. None of the ''points'' made by appellants comply with said Rule 20 concerning the specification of error, nor is urged error separately and particularly set out, although litigants and their counsel have been admonished the said Rule 20 must be strictly observed. (*Chapman Bros. Co. v. Security*

First Nat. Bank, 9 Cir., 111 F. 2d 86, 87; *Sampsell v. Anches,* 9 Cir., 108 F. 2d 945, 948.)

Again, in "Point 2" both appellants jointly attack the Referee's findings numbered (3), (4), (6), (8), (10), (11), and (13). (App. Op. Bf. 11.) Both jointly challenged such findings in their "Concise Statement" filed under Rule 19, subdivision 6, of this court. (T. 262.) But findings numbered (6), (8), (10), and (13) have reference solely to the appellant San Mateo Feed & Fuel Company. (T. 236-238.) Obviously, the appellant H. E. Casey Company has no concern with such findings. Corresponding findings numbered (5), (7), (9), and (12), applicable solely to the appellant H. E. Casey Company (T. 236-238), have not been attacked in the brief, and were not challenged in the said "Concise Statement" (T. 262).

ARGUMENT OF THE CASE.

Summary of Argument.

1. The sufficiency of the petition for the turnover order is moot. Its scope was enlarged by the order of the District Court on October 4, 1943. Appellants did not object to the sufficiency of the petition or the scope of the issues before the Referee. No defect in form affected the substantial rights of the appellants.

2. The substantial rights of the appellants were not affected by any ruling of the Referee respecting the records of the bankruptcy proceeding. Appellants have not affirmatively shown error, for the evidence

which they say the Referee improperly received and considered is not contained in the record on appeal. Appellants did not object to the Referee considering the bankrupt's schedule and affidavit. On the contrary, they affirmatively consented to their consideration.

3. The evidence in the record is sufficient to support the findings and turnover order of the Referee. It satisfies all the elements essential to avoidable preference, for it establishes: (a) A transfer of property of the debtor to the appellant creditors for or on account of an antecedent debt, (b) while the debtor was insolvent, (c) within four months before the filing of the petition in bankruptcy, (d) enabling the appellant creditors to obtain a greater percentage of their debts than some other creditor of the same class, (e) and made at a time when the appellant creditors had reasonable cause to believe that the debtor was insolvent.

4. The turnover order made by the Referee was sound in law and sound in fact, and was properly affirmed and adopted by the District Court. Therefore the order of the District Court should be affirmed by this court.

---

1. THE SUFFICIENCY OF THE PETITION FOR THE TURNOVER ORDER IS MOOT.

In Point 3 of their brief the appellants contend that the trustee's petition for a turnover order does not state facts sufficient to warrant the relief granted by the Referee and affirmed and adopted by the District Court. (App. Op. Bf. 10.)

The contention is moot for at least three reasons. The first reason is that the scope of the petition was enlarged by the order of the District Court made on October 4, 1943. (T. 57-58.) That order was made pursuant to a petition for review filed by the trustee when she was confronted by an adverse ruling of the Referee that she had not proved insolvency of the debtor at the time of transfer. In her petition for review the trustee offered to prove:

> "1. That within four months of the filing of Bankrupt's petition herein, and more particularly between December 30, 1941, and the date upon which he filed said petition, April 29, 1942, and upon each and every intervening day, the aggregate of all Bankrupt's property, exclusive of the total sums conveyed by him to the Respondents herein, was not, at a fair valuation thereof, sufficient to pay his debts.
>
> "2. That Respondents actually knew Bankrupt's financial condition was such that in January, 1942, he was compelled to and did close his business and had no money or property with which to pay all of his outstanding debts; that this condition existed not only at the time of the closing of the same, but also continually for more than one month prior thereto and continually thereafter up to and including April 29, 1942.
>
> "3. That Respondents had reasonable cause to believe Bankrupt was insolvent within the meaning of the Bankruptcy Act, at the times they received such payments.
>
> "4. That by the very manner in which Respondents obtained the preferential payments, and their activities leading up to their acquiring said

payments, Respondents knew they were obtaining preferences." (T. 7-8.)

This offer of proof was supported by the affidavit of the bankrupt particularizing the facts. (T. 10-14.) On consideration thereof, the Referee recommended that the records be remanded "with instructions to take such further proceedings as are warranted in the premises". (T. 14-15.) The order of the District Court on October 4, 1943, remanded the records to the Referee "for further proceedings, in accordance with his request". (T. 57-58.) No appeal from the order of the District Court was taken by the appellants herein, although such order was reviewable by appeal to this court under section 24, subdivision a, of the Bankrupty Act. (11 U.S.C.A., sec. 47, subd. a.) Whatever the original scope of the petition for turnover order may have been, it is obvious that it was enlarged by the order of the District Court to permit proof of the elements which appellants assert were lacking from the petition as filed.

The second reason why the contention is moot, is that the sufficiency of the petition was in no way challenged in the proceedings before the Referee. Nor was any objection made by appellants to the scope of the issues before the Referee. On the contrary, appellants vigorously contested all issues on the merits. Under such circumstances their belated attack upon the sufficiency of the petition is moot. The case of *In Re Kantor's Delicatessen,* 34 F. Supp. 899, is decisive on the subject. It is there said, at page 902:

"On behalf of the landlord, the petitioner, however, it is contended that the proofs of conspiracy, taken before the Referee, were not within the issues framed by the pleadings.

The record, however, does not show that any objections were made by the counsel for the petitioning landlord to the receipt of proof offered to show the conspiracy, on the ground that it was not within the issues framed by the pleadings. On the contrary, they vigorously contested the issue of conspiracy on the merits.

Rule 15, subdivision (b), of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, provides as follows:

'(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment to the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.'

> The Rules of Federal Civil Procedure apply to Bankruptcy cases, General Order No. 37, 11 U.S.C.A. following section 53 in effect February 13, 1939. In Re Harbor Stores Corp., D.C. 33 F. Supp. 360; Kroell v. New York Ambassador, Inc., 2 Cir., 108 F. 2d 294.
>
> The sole question is: Was 'implied consent' given?
>
> From the record, it appears to me that such was the case. * * *
>
> The Federal Rules of Civil Procedure do not speak of causes of action, but of claims and claims to relief, and the Trustee should be denied relief only when, under the facts proved, he is entitled to none. Nester v. Western Union Telegraph Co., D.C., 25 F. Supp. 478, at page 481.
>
> It is true that no amendment was ever made to conform the pleadings to the proof, but under Rule 15 (b) of the Federal Rules of Civil Procedure, that would not deprive the Trustee of the right to recover, because if this Court, or even the Appellate Court, should consider it necessary, they would have the right to allow such amendment. Swift & Co. v. Young, 4 Cir., 107 F. 2d 170, at page 172; In Re Cleveland Discount Co., D.C., 5 F. 2d 846."

The third reason is that appellants make no attempt at showing in their brief that any defect in the petition affected their substantial rights. Reference may be made to Rule 61, of the Federal Rules of Civil Procedure (28 U.S.C.A. following sec. 723c), which provides:

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court in every stage of the proceedings must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties."

---

2. THE SUBSTANTIAL RIGHTS OF THE APPELLANTS WERE NOT AFFECTED BY ANY RULING OF THE REFEREE RESPECTING THE RECORDS OF THE BANKRUPTCY PROCEEDING.

Appellants' Point 4 is that the "referee improperly received and considered in evidence . . . all the records of the bankruptcy proceeding, including the bankrupt's schedule and . . . ex parte affidavit. (App. Op. Bf. p. 11.)

The "point" is prefaced with the alien statement that the Referee "arbitrarily" *declined* to receive and consider evidence as to "course of business dealings". (Ap. Op. Bf. 11.) No "point" of that character is suggested in the "Concise Statement of Points to be Relied Upon by Appellants on Appeal" filed by appellants under Rule 19, subdivision 6, of this court. (T. 261-264.) Reply to the alien statement is therefore unnecessary.

The balance of the "point" consists in a quotation from Remington on Bankruptcy, 4th ed., sec. 2260, to the effect that "the schedules of the bankrupt are inadmissible against a transferee", and the quotation from a case there cited in support of the text. (Ap. Op. Bf. 12.) The concluding sentence of Remington's said section 2260 is omitted by appellants. It reads:

> "But due objection to their admission must be made at the time, else the objection is waived."

And the said concluding sentence is fully supported by the case there cited, to-wit, *Osley v. Adams,* 5 Cir., 268 F. 114, 116.

The manner in which appellants present their said Point 4 demonstrates the advisability of requiring strict observance of Rule 20, subdivision 2 (d), of this court, concerning specification of error. Observance of that Rule would have required appellants to "quote the grounds urged at the trial for the objection and the full substance of the evidence admitted". The bankrupt's schedule is not contained in the record on appeal. On such state of the record an affirmative showing of error cannot possibly be made by the appellants. Moreover, when reference is made to the record it will be found that neither the bankrupt's schedule nor his *ex parte* affidavit were admitted in evidence. It will also be found that appellants not only failed to object to their consideration by the Referee, but they affirmatively consented to their consideration. The record is quoted:

> "Mr. Margolis. * * * We, therefore, ask at this time, if it please your Honor, that the petition

and schedules be introduced in evidence and marked as a portion of the record, by designating it Trustee's Exhibit 'A'.

The Referee. They are part of the record anyway.

Mr. Margolis. Yes, but I would like to offer them in evidence, your Honor.

The Referee. You don't have to do it. Under the Federal rule, they are before the Court and the Court will take into consideration everything in the record.

Mr. Margolis. Very well." (T. 144.)

"The Referee. He would have to show he had other creditors or it could not be a voidable preference if they did receive it.

Mr. Hoffman. The schedules speak for that.

The Referee. Are you willing to rest on the schedules? You are not objecting to them?

Mr. Hoffman. The only thing I am objecting to on the schedules is, we are not named." (T. 169.)

"Mr. Margolis. Mr. Hoffman, your Honor, stated a moment ago that his client is not named in the schedule.

Mr. Hoffman. I was kidding.

Mr. Margolis. Maybe I misunderstood. You asked a question, whether they had an objection to the schedules. We offered them before; your Honor said it was not necessary.

The Referee. They are before the Court." (T. 169.)

"Mr. Margolis. I think counsel has in mind that it is set out by affiant in the affidavit that the only property he had was $50 at the time he filed, which was subject to attachment.

The Referee. That is not disputed. But, anything so far as the affidavit stands." (T. 179.)

"Q. You (Scardino) have listed in your schedules, certain wage claims, certain people you owe money for wages. Is that correct?

A. Well, it was the men working for me.

Q. That is right. The workmen?

A. Yes." (T. 160.)

Finally, the bankrupt was fully examined and cross-examined respecting his schedules and affidavit, and the turnover order may be supported by that testimony. It therefore follows that even if it be assumed that the Referee should not have "considered" the schedules and affidavit, it cannot be said that any substantial rights of the appellants were thereby affected.

---

3. THE EVIDENCE IN THE RECORD IS SUFFICENT TO SUPPORT THE FINDINGS AND TURNOVER ORDER OF THE REFEREE.

Rule 52, subdivision (a), of the Federal Rules of Civil Procedure (28 U.S.C.A. fol. sec. 723c) provides:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In *Wittmayer v. United States,* 9 Cir., 118 F. 2d 808, it was said, at page 811:

"The findings of the trial Court fall within the familiar rule, that where based upon conflicting evidence they are presumptively correct, and un-

less some obvious error of law, or mistake of fact, has intervened, they will be permitted to stand. Silver King Coalition Mines Co. v. Silver King C. M. Co., 8 Cir., 204 F. 166, 177.

The provisions of the new procedural rules that the findings of fact of the trial judge are to be accepted on appeal unless clearly wrong (Rule 52(a), 28 U.S.C.A. following section 723c), is but the formulation of a rule long recognized and applied by courts of equity. Guilford Const. Co. v. Biggs, 4 Cir., 102 F. 2d 46, 47.

As was said by Mr. Justice Holmes in Adamson v. Gilliland, 242 U.S. 350, 353, 37 S.Ct. 169, 170, 61 L.Ed. 356 (citing Davis v. Schwartz, 155 U.S. 631, 636, 15 S.Ct. 237, 39 L.Ed. 289), the case is pre-eminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' "

And in *In Re Magnet Oil Co.,* 9 Cir., 119 F. 2d 260, it was said, at pages 261 and 262:

(261) "The referee found it was not true that the notes were to be paid out of a sale of Magnet's stock. The District Judge (262) approved the finding and adopted it as his own. The finding is amply supported by evidence. We accept it, therefore, and reject appellant's contention that the obligation evidenced by the notes was a conditional one."

Tested by the foregoing rules, the record discloses ample evidence to support each element of voidable preference and the findings to that effect made by the Referee as against each appellant.

(a) A transfer was made of property of the debtor to each appellant creditor for or on account of the antecedent debt.

The bankrupt was a plastering contractor. He did work for several general contractors, including Conway & Culligan. He bought materials from the appellants on open account. (T. 45, 119.) He went out of business around the middle of February, 1942 (T. 152), and filed his petition in bankruptcy on April 29, 1942 (T. 2).

At the time the bankrupt went out of business he was indebted to the appellant H. E. Casey Company in the sum of $4308.73 on open account. (T. 42.) On January 15, 1942, he had made assignments to said appellant of moneys coming to him from one Schmidt, and on January 20, 1942, said appellant collected from said Schmidt the respective sums of $232.23 and $246.50. (T. 36-39.) On February 18, 1942, the bankrupt assigned to said appellant the sum of $2035.89 coming to the bankrupt from Conway & Culligan. (T. 31-32.) On February 20, 1942, the bankrupt assigned to both appellants monies due him from Conway & Culligan, and the assignment was accepted by Conway & Culligan. (T. 48-49.) Between February 24, 1942, and April 27, 1942, appellant H. E. Casey Company collected from Conway & Culligan by virtue of either or both of said assignments the said sum of $2035.89 and applied it on the indebtedness of the bankrupt.

(T. 97.) An indebtedness of $1031.52 on the open book account remained in favor of said appellant. (T. 24.) No creditor's claim was filed by said appellant in the bankruptcy proceeding. (T. 250.)

At the time the bankrupt went out of business in February, 1942, he was indebted to appellant San Mateo Feed & Fuel Company in the sum of $1838.26 on an open account. (T. 122.) Between December 30, 1941, and February 10, 1942, the said appellant had collected from debtors of the bankrupt the sum of $424.12 and applied it on the indebtedness of the bankrupt. (T. 121.) Between February 19, 1942, and March 12, 1942, the said appellant collected from debtors of the bankrupt the sum of $621.23, and applied it on the indebtedness of the bankrupt. (T. 121.) The total thus collected was the sum of $1025.35. An indebtedness of $1009.11 remained on the open book account in favor of said appellant. (T. 122.) No creditor's claim was filed by said appellant in the bankruptcy proceeding. (T. 250.)

In *Grandison v. National Bank of Commerce,* 2 Cir., 231 F. 800, it was said, at pages 803 and 804:

> "That a 'transfer' of the property of the debtor was made is certain. That several transfers were made to Alexander and through him to defendant, is not denied. It is not essential that the transfers should have been made directly to defendant. Any method of depleting an insolvent fund is sufficient. See Remington on Bankruptcy, sec. 1300. As stated in National Bank of Newport v. National Herkimer County Bank, 225 U.S. 178, 184, 32 S.Ct. 633, 635, 56 L.Ed. 1042 (1912):

'To constitute a preference, it is not necessary that the transfer be made directly to the creditor. It may be made to another, for his benefit. If the bankrupt has made a transfer of his property, the effect of which is to enable one of his creditors to obtain a greater percentage of his debt than another creditor of the same class, circuity of arrangement will not avail to save it.'

And, in the same case the court, speaking through Mr. Justice Hughes, said:

'The "accounts receivable" of the debtor, that is, the amounts owing to him on open account—are, of course, as susceptible of preferential disposition as any other property; and if an insolvent debtor arranges to pay a favored creditor through the disposition of such an account, to the depletion of his estate, it must be regarded as equally a preference, whether he procures the payment to be made on his behalf by the debtor in the account, the same to constitute a payment in whole or part of the latter's debt, or he collects the amount and pays it over to his creditor directly. This implies that, in the former case (804) the debtor in the account, for the purpose of the preferential payment is acting as the representative of the insolvent, and is simply complying with the direction of the latter in paying the money to his creditor.' "

(b) The transfer was made while the debtor was insolvent.

The Referee made the following findings:

"(5) At the time of the making of said assignment by the bankrupt to said H. E. Casey Company, said bankrupt was insolvent, and, at said

time, said H. E. Casey Company had reasonable cause to believe that said bankrupt was insolvent;

(6) At the time of the making of said assignment by the bankrupt to said San Mateo Feed and Fuel Co., said bankrupt was insolvent, and, at said time, said San Mateo Feed and Fuel Co. had reasonable cause to believe that said bankrupt was insolvent; . . ." (T. 236-237.)

As earlier mentioned, in Point 2 the appellants *jointly* challenge the sufficiency of the evidence to support above quoted finding No. (6). (App. Op. Bf. p. 6.) Of course the appellant H. E. Casey Company can have no concern with quoted finding No. (6) which is applicable only to its co-appellant. Neither appellant challenged the sufficiency of the evidence to support above quoted finding No. (5). Their *joint* "Concise Statement of Points to be Relied upon by Appellants on Appeal", filed under Rule 19, subdivision 6, of this court, has no reference to said finding No. (5). (T. 261-265.) Under such circumstances it may be doubted that the appellant H. E. Casey Company has any standing in court to question the sufficiency of the evidence to support the finding of transfer while insolvent.

However, there is ample evidence in the record to support a finding as to each appellant that transfer was made while the debtor was insolvent. The bankrupt testified as follows:

"Q. Now at the time you made these payments to San Mateo Feed & Fuel Company and to H. E. Casey & Company, was the value of all the prop-

erty you had sufficient, at its fair market value, to pay all the debts that you had?

A. No, sir." (T. 148.)

"Q. Now, on any of the dates during the period between December 29, 1941, and April 29, 1942, was the sum total of all the property you had, exclusive of the payments which were made to Casey & Company and San Mateo Feed & Fuel, sufficient to pay all of your then liabilities?

A. No, sir." (T. 150.)

This testimony plainly measurs up to the definition of "insolvent" contained in section 1 (15) of the Bankruptcy Act. (11 U.S.C.A., sec. 1 (15).)

(c) The transfer was made within four months before the filing of the petition in bankruptcy.

Both appellants contend that Referee's finding No. (4) is not supported by the evidence. (App. Op. Bf. 6.) In the part pertinent to the discussion, it reads (T. 246):

"(4) Said assignments were, and each of them was, made by said bankrupt to the respective assignees within four months of the filing of the bankrupt's petition to be adjudicated a bankrupt."

That the petition in bankruptcy was filed on April 29, 1942, is not open to question. (T. 2.) It was admitted by the respective answers made by the appellants to the trustee's petition for turnover order. (T. 20, 23.)

In an earlier part of this brief it was shown that transfers were made to appellant H. E. Casey Company between January 20, 1942, and February 20, 1942, and that transfers were made to appellant San Mateo Feed & Fuel Company between December 30, 1941, and March 12, 1942. Simple computation therefore demonstrates that the transfers were made within four months before the filing of the petition in bankruptcy.

(d) The effect of the transfer was to enable the appellants to obtain a greater percentage of their debts than some other creditor of the same class.

The Referee made these findings (T. 237):

"(7) When said assignment was made to said H. E. Casey Company the estate of said bankrupt was, and still is, depleted to the extent of $2,534.76;

(8) When said assignment was made to said San Mateo Feed and Fuel Co., the estate of said bankrupt was, and still is, depleted to the further extent of $1,025.35;

(9) By said assignment by said bankrupt to said H. E. Casey Company said last mentioned company secured an undue advantage over other creditors of the same class who, like said last mentioned company and said San Mateo Feed and Fuel Co. were, and are, unsecured creditors of said bankrupt;

(10) By said assignment by said bankrupt to said San Mateo Feed and Fuel Company, said last mentioned company secured an undue advantage over other creditors of the same class who, like said H. E. Casey Company were, and now are, unsecured creditors of said bankrupt; . . ."

The appellants *jointly* challenge quoted findings Nos. (8) and (10). (App. Op. Bf. p. 6.) Neither appellant challenges quoted findings Nos. (7) and (9). (T. 262.)

In their statement of Point 7 the appellants say that the evidence was insufficient to support a finding that they were unsecured creditors or secured an undue advantage over other creditors of the same class. (App. Op. Bf. p. 18.)

No argument is made or authority cited under the "point" to support a contention that they were secured creditors. Had such contention been made a complete answer thereto would be found in the cases of *Mallot & Peterson v. Street,* 9 Cir., 4 F. 2d 770, and *De Forest v. Crane & Ordway Co.,* 179 Pac. 291, 293-4.

Nor is any argument made or authority cited under the "point" to support a contention that there were not other creditors of the same unsecured class over whom appellants secured an advantage. Elsewhere in the brief, however, and under Point 8, the appellants assert that there was no evidence, apart from the bankruptcy schedule, showing the existence of such other creditors. Appellants are mistaken. The bankrupt gave this testimony:

> "Q. The claims you set forth, the unsecured: State Compensation Ins. Fund; Industrial Indemnity Co., two items here; Blake-Moffit-Towne Paper Co.; Markus Cut-Rate Hardware; Frank Peri and Sequoia Market, totalling the sum of $1,858.22, were those owing on or about December 29, 1941? You owed those people at that time?
>
> A. Yes.

Q. On one claim, $74.80, of Industrial Indemnity Co., I notice you have the date 11/6 to 12/6/41?

A. Yes.

Q. Then the other claim of the Industrial Indemnity Co. which goes from 12/6/41 to 1/6/42 is in the amount of $59?

A. Yes.

Q. These other claims, State Compansation Ins. Fund $344.30, Blake-Moffit-Towne Paper Co., $74.00, Markus Cut-Rate Hardware, Oakland, $331.00, Frank Peri, $900.00, Sequoia Grocery Market, Redwood City, $75.00. Did you owe those bills on or about December 29, 1941?

A. Yes, sir.

Q. Did you owe these laborers approximately the amounts set out under Schedule A (1): Clarence G. Deals, $47; T. Purcelli, $55.50; H. Carlson, $63; H. Hampton, $51; Don O'Leary, $98; George Leith, $63; T. Cacano, $111; Joe Reginato, $111; Joe Chiri, $120; T. Spoon, $51? Did you owe those amounts at or about December 29, 1941?

A. Yes, I did.

Q. Did you pay these creditors whom I have enumerated?

A. No, I did not have much money. I used to keep that money. I still owe that money since that time, their quitting time, because I did not have enough, so I carry it, see, when I cannot pay any more.

Q. In other words, you paid a little on the current work?

A. Yes.

Q. But not on the past?

A. Yes." (T. 171-172.)

In speaking of the element of "undue advantage" or "greater percentage", it was said in *Palmer Clay Products Co. v. Brown,* 297 U.S. 227, 228, 56 S.Ct. 450, 451, 80 L.Ed. 657:

> "Whether a creditor has received a preference is to be determined, not by what the situation would have been if the debtor's assets had been liquidated and distributed among his creditors at the time the alleged preferential payment was made, but by the actual effect of the payment as determined when bankruptcy results. The payment on account of say 10 per cent. within the four months will necessarily result in such creditor receiving a greater percentage than other creditors, if the distribution in bankruptcy is less than 100 per cent. For where the creditor's claim is $10,000, the payment on account of $1000, and the distribution in bankruptcy of 50 per cent., the creditor to whom the payment on account is made receives $5,500, while another creditor to whom the same amount was owing and no payment on account was made will receive only $5,000. A payment which enables the creditor 'to obtain a greater percentage of his debt than any other of such creditors of the same class' is a preference."

Since it appears from figures earlier presented that the appellant H. E. Casey Company received about 70% of its claim and the appellant San Mateo Feed & Fuel Company received about 50% of its claim, it would be idle for anyone to deny that the effect of the transfer was to enable the appellants to obtain a greater percentage of their debts than the other creditors of the same class holding claims in the sum of $1858.22.

(e) The transfer was made at a time when the appellant creditors had reasonable cause to believe that the debtor was insolvent.

In previously quoted finding No. (6) the Referee found that "at the time of the making of said assignment by the bankrupt to said San Mateo Feed and Fuel Co., . . . said San Mateo Feed and Fuel Co. had reasonable cause to believe that said bankrupt was insolvent". (T. 236-237.) Corresponding finding No. (5) respecting the appellant H. E. Casey Company was not challenged. (T. 236.)

The issue of "reasonable cause" was essentially one of fact for the Referee as the trier of fact, including the facts proved and all reasonable inferences that might be drawn therefrom, and as there was substantial evidence to support his findings on the subject they must be accepted as conclusive on the appeal. (*Kaufman v. Tredway,* 105 U.S. 271, 25 S.Ct. 33, 49 L.Ed. 190; *Pyle v. Texas Transport etc. Co.,* 238 U.S. 90, 35 S.Ct. 667, 59 L.Ed. 1215; *Remington on Bankruptcy,* vol. 4-A, sec. 1707.) That the Referee as the trier of fact had broad power to sift the evidence and determine the credibility of the witnesses who appeared before him, is undeniable. (*Quock Ting v. United States,* 140 U.S. 417, 420-1, 11 S.Ct. 733, 734-5, 35 L.Ed. 501, 502.)

The bankrupt gave this testimony:

"Q. Did you sign a document similar to that at any time?

A. I signed a bunch of them similar to that, which was smaller than this, which the bookkeeper from Casey Company came down to the

house and he wants me to sign all these papers, I recall it, to individual general contractors.

Q. Did you have the original of that document at any time?

A. No, I did not.

Q. Did you ever sign the original?

A. I keep one and signed. He kept the other.

Q. Did you sign one?

A. Yes, I did sign all.

Q. Now, whom did you give them to?

A. To the bookkeeper, whoever was in charge of the collections.

Q. Do you know the name of the bookkeeper?

A. I don't recall. I think you got it in the book there.

Q. Do you know who Jules Mednich is?

A. Jules Mednich.

Q. Is that the man you spoke to?

Mr. Mullin. We will stipulate that he was the bookkeeper at the time for H. E. Casey Company.

* * *

Q. The original of this was signed on or about that date (February 18, 1942)?

A. Yes.

Q. Did you have any conversation with this gentleman prior to this date?

A. On that day, no.

Q. Prior to that date, did you have conversations with him in connection with the money you owed H. E. Casey & Company?

A. He used to come and complain the account was too big, I will have to pay this bill. I told him I am broke, I have no money. If I cannot collect, I cannot pay.

Q. You say he used to come, where, to your home?

A. Sometimes he came to my home and could not find me and he looked around on the jobs until he met me, which was mostly 39th Avenue, or Conway and Culligan's any place he could get hold of me.

Q. What was the extent of the conversation? What did you say to him?

A. He say: 'We have to get some money; we cannot go on like this.' I say: 'I cannot help it. I got no money; I am broke.'

Q. And how long prior to February 18, 1942, did this conversation take place? Was it a month before?

A. I would say more than that, and he was talking right along. In fact, there was another bookkeeper before that. I was in bad condition on the payments and he used to go to the general contractor and tell him, 'Don't make any more checks. Whenever you make the check, to make it jointly.' " (T. 67-70.)

"Q. Now, you also testified that the date that assignment was signed, that letter on Conway and Culligan's stationery, that no one from the San Mateo Feed & Fuel Company was there that day?

A. No.

Q. Do you mean to say that you saw and spoke to them in connection with that at any other time?

* * *

A. Yes, the bookkeeper, I think, came down before I signed this. * * *

The Witness. A. Before I signed this, the San Mateo Feed & Fuel came down and found me on the jobs and I signed those assignments for them." (T. 80.)

"Q. How long have you known Moore?

A. I know him since late 1937. * * *

Q. And, do you know when he became connected with San Mateo Feed & Fuel Company?

A. I could not tell.

Q. Approximately?

A. I cannot tell exactly, but I would say around 1940 or late 1939; around there; I could not say exactly." (T. 146.)

"Q. You say in your affidavit that you spoke with Mr. Moore in January of 1942?

A. Well, he came around in 1940 and told me that he had to have some money.

Q. For whom did he tell you he had to have some money?

A. For San Mateo Feed & Fuel Company.

Q. What did you tell him at that time?

A. I tell him I haven't; I am broke; I got no money and unless I collect, I cannot give you another penny.

Q. Tell me, did you speak to him about closing up your operations at that time?

A. Yes.

Q. When was that?

A. It was around January, 1942; it would be January 15th, something like that, you know, I cannot exactly say the date.

Q. When did you actually close your operations? Do you know?

A. Somewhere in February.

A. Of 1942?

A. Yes." (T. 147-148.)

"Q. Did you have any member of the firm of the San Mateo Feed & Fuel Company, or the bookkeeper, call on you about this time in connec-

tion with the obligation due the San Mateo Feed & Fuel?

A. The bookkeeper comes and brings those assignments and makes me sign to give him full authority to collect the money that is coming. I think that is what I signed; that is these I signed, every one of those are individual.

Q. Each and every one has your signature?

A. Yes.

Q. Dated February 17, 1942?

A. That is right. Those are my signatures, yes, sir.

Q. Now, can you tell the Court where these were signed, were you in a house, an office, where, if you recall?

A. I think, I cannot recall, we were down on 39th Avenue on this job, right on the street, or either in his car.

Q. Whose car?

A. The fellow who was collecting.

Mr. Hoffman. What is his name?

Mr. Mullin. Jack DeMonte.

Mr. Margolis. * * * Do you remember Jack DeMonte?

A. I say I know the man when I see him. I told you I don't know the name unless you tell me now.

Q. Does that name refresh your memory?

A. That is right.

Q. You had seen him before that time?

A. Every other day he used to come around on the jobs.

Q. What conversation did you have with him?

A. He came down, he was in charge to collect money for the San Mateo Feed & Fuel, and said unless I say some money he will lose his job. I

say: 'I haven't got no money. When I collect, I will give it to you.'

Q. Did you discuss your financial condition with him generally?

A. I did. I told him I am broke, I got no money in the bank or any place else." (T. 72-73.)

Harold E. Casey, one of the partners of the appellant H. E. Casey Company (T. 23), gave this testimony:

"Q. Where did the suggestion come from for the execution of that assignment, do you know, Mr. Casey? * * *

A. Well, at the time Mr. Scardino was having his trouble, not paying labor bills and material bills, we went to Conway and Culligan and demanded the money or we would have to proceed with our lien rights.

Q. Those troubles you spoke of occurred about the time it was executed?

A. That is right, prior to that.

Q. January?

A. February, I think, is the date.

Q. Along in January when those non-negotiable documents were executed on the form of the American Trust Company?

A. That is right." (T. 47.)

John Damonte, credit manager for San Mateo Feed & Fuel Company until February 28, 1942 (T. 204), testified as follows:

"Q. You say you found he never had money in the bank, at the time of this attachment that you were familiar with?

A. Whether I actually had found he had no money in the bank, I don't know. What I mean to say is, I just didn't feel there was any money in there.

Q. Did you make inquiry?

A. I may have. I am trying to remember on what I am basing the opinion that the bank account was footless. Maybe the gossip was that he had no money. I know what it is. He had his payroll payment and could not meet the payments back in 1941. I knew at that time there was no use worrying about his bank account, attaching it or anything else to get out money.

Q. That condition prevailed all through that period until you ceased employment with the San Mateo Feed & Fuel Company?

A. What condition is that?

Q. That checks were bouncing on his payroll?

A. I don't know about that. I know on that one occasion I thought I had discovered something. I said: 'Now I know where his bank account is. I don't have to worry', and undoubtedly, I found out the checks were bouncing and forgot the bank account.

Q. When was that, January, 1942?

A. No, that was in 1941, the fall of '41. * * *

Q. Did you follow your investigation or examination until after the time these checks bounced? * * *

A. I gave it no more thought. I though after that, it is up to me to keep after him, if the contractors were anywhere good." (T. 210-211.)

"Q. You conveyed this information resulting from the investigation you made to Mr. Ferris?

A. What investigation?

Q. With respect to your attempt to collect?
A. I said there was darned little to collect from." (T. 213.)

Section 60 of the Bankruptcy Act (11 U.S.C.A., sec. 96) does not require that a creditor have actual knowledge that his debtor is insolvent, and subdivision (b) thereof specifically provides that a preference may be avoided if the creditor "or his agent acting with reference thereto" has reasonable cause to believe that the debtor is insolvent. And it is a general rule that "notice of facts which would incite a man of ordinary prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose". (*Grandison v. National Bank of Commerce,* 2 Cir., 231 F. 800, 809.)

In view of the circumstances disclosed by the testimony quoted under this subdivision it certainly cannot be said that the findings of the court to the effect that the transfer was made at a time when the appellant creditors had reasonable cause to believe that the debtor was insolvent are "clearly erroneous".

---

4. **THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED FOR THE REASON THAT IT PROPERLY AFFIRMED AND ADOPTED THE TURNOVER ORDER OF THE REFEREE.**

It was said in *In re Penfield Distilling Co.,* 6 Cir., 131 F. 2d 694, at page 694:

"Appellant pulls a heavy laboring oar. Findings of fact by a referee in bankruptcy, confirmed by the district judge, will not be set aside, on

appeal, on anything less than a demonstration of plain mistake."

On the record, it is clear that the turnover order of the Referee is sound in law and sound in fact, and appellee therefore respectfully submits that the order of the District Court, affirming and adopting that order, should be affirmed.

Dated, San Francisco,
May 2, 1945.

MAX H. MARGOLIS,
HERBERT CHAMBERLIN,
Attorneys for Appellee.

No. 10945

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES GOODWIN POWELL and
ANNA STRACHAN POWELL, husband and wife,
Appellants,

vs.

PETER J. WUMKES,
Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

---

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

No. 10945

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES GOODWIN POWELL and
ANNA STRACHAN POWELL, husband and wife,
Appellants,

vs.

PETER J. WUMKES,
Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

---

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Page

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

H. R. GRIFFIN
408-10 Katz Bldg.
San Bernardino, Calif.

For Appellee:

NICHOLS, COOPER & HICKSON
412-418 First National Bank Bldg.
Pomona, Calif.

and

C. P. VON HERZEN
453 South Spring St.
Los Angeles 13, Calif. [1*]

*Page number appearing at foot of Certified Transcript.

District Court of the United States
Southern District of California
Central Division

No. 36,775-C Bkcy.

In the Matter of

JAMES GOODWIN POWELL and
ANNA STRACHAN POWELL,
husband and wife,

Debtor.

APPROVAL OF DEBTOR'S PETITION
and Order of Reference
(under Section 75 Bankruptcy Act)

At Los Angeles, in said District, on July 25, 1940, before the said Court the petition of James Goodwin Powell and Anna Strachan Powell, husband and wife, that they desire to effect a composition or an extension of time to pay their debts, and such other relief as may be allowed under the Act of March 3, 1933, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Fred Duffy, Esq., one of the Conciliation Commissioners in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said James Goodwin Powell and Anna Strachan Powell, husband and wife, shall attend before said Conciliation Commissioner on August 1, 1940, and at such time as said Conciliation Commissioner shall designate, at his office in San Bernardino, California, and shall submit to such or-

ders as may be made by said Conciliation Commissioner or by this Court relating to said matter.

Witness, the Honorable Paul J. McCormick, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on July 25, 1940.

(Seal) R. S. ZIMMERMAN,
Clerk
By F. Betz
Deputy Clerk

[Endorsed]: Filed Jul. 25, 1940. [3]

[Title of District Court and Cause.]

AMENDED PETITION.

To the Honorable Paul J. McCormick, Judge of the District Court of the United States, for the District above set forth:

Your petitioners, the above named James Goodwin Powell and Anna Strachan Powell, would show unto your Honor, that they did on the 20th day of July, 1940 file in this Court, a petition under Section 75 of the Bankruptcy Act, as amended, which petition is still pending, that they have been unable to obtain acceptance of the majority in number and amount of all creditors, whose claims are affected by the composition and extension proposal, which they submitted at the First Meeting of Creditors, to the Conciliation Commissioner, appointed by this Court.

That as permitted by the first paragraph of Sub Section (s) Section 75 of the Bankruptcy Act, as amended, they

do hereby amend their petition heretofore filed on the 20th day of July, 1940 and they do substitute for the provisions of said petition as may be in conflict with this amendment, the contents of this amendment.

And They Pray that they may be adjudged *a* Bankrupt, that proceedings may be had in regard to any and all property in conformity with the law in regard to procedure under Sub Section (s) of Section 75 of the Bankruptcy Act, as amended.

That all their property wherever located, whether pledged, encumbered or unencumbered, be appraised; that the unencumbered exemptions and unencumbered interest or equity in their exemptions as prescribed by the law of the State of California, as set forth in the schedules heretofore filed in this matter, be set aside and set off to them; and that they be allowed to retain possession under the supervision and control of the Court, of any part or parcel or all of the remainder of property including their encumbered exemptions and pay for the same under the terms and [4] conditions of Sub Section (s) of Section 75 of the Bankruptcy Act, as Amended.

he Further Pray for all needful and lawful proceedings under the provisions of law which do become applicable on the filing of this petition and particularly those provisions contained in Sub Section (s) of Section 75 of the Bankruptcy Act, as Amended.

JAMES GOODWIN POWELL
ANNA STRACHAN POWELL
Petitioners

[Verified.]

[Endorsed]: Filed Oct. 24, 1940. [5]

[Title of District Court and Cause.]

CERTIFICATE OF CONCILIATION COMMISSIONER

I, Fred Duffy, the Conciliation Commissioner of the above entitled Court, in and for the County of San Bernardino, do hereby certify that the Composition and/or Extension has failed, and I hereby make the following recommendation to the Honorable Judge of the above entitled Court, to-wit:

That James Goodwin Powell and Anna Strachan Powell be adjudicated *a* bankrupt under and pursuant to Section 75 (s) of the Bankruptcy Act.

Dated: October 23rd, 1940.

FRED DUFFY

FRED DUFFY,

Conciliation Commissioner for San Bernardino County, California.

[Endorsed]: Filed Oct. 24, 1940. |6]

[Title of District Court and Cause.]

ADJUDICATION, ORDER OF REFERENCE, AND TEMPORARY RESTRAINING ORDER

Under Section 75-s, Bankruptcy Act

At Los Angeles, in said District, on October 24, 1940 before said Court in Bankruptcy, the Petition of James Goodwin Powell and Anna Strachan Powell, husband and wife, debtors in the above-entitled matter, that they be adjudged *a* bankrupt under the terms and provisions of Section 75-s of the Bankruptcy Act, and within the true intent and meaning of the Acts of Congress relating to Bankruptcy, having been heard and duly considered, the said James Goodwin Powell and Anna Strachan Powell, husband and wife *is* hereby declared and adjudged *a* bankrupt accordingly.

It is thereupon ordered that said matter be referred to Fred Duffy, Esq., the Conciliation Commissioner for San Bernardino County, to act as Referee in Bankruptcy of this Court and to take such further proceedings therein as are required by said Acts; and that the said James Goodwin Powell and Anna Strachan Powell, husband and wife, shall attend before said Conciliation Commissioner, acting as Referee, at his office in San Bernardino, California, on October 31, 1940 at 10:00 o'clock a. m. and shall submit to such orders as may be made by said Conciliation Commissioner, acting as such Referee or by this Court relating to said matter in Bankruptcy.

And it is further ordered, adjudged and decreed that all creditors of the above-named bankrupt be and they are hereby enjoined and restrained from commencing or maintaining any judicial or official proceedings in any Court, or under the direction of any official against the said bankrupt or any of his property, and from proceeding with any sale of the Bankrupt's property under the terms of any Deed of Trust, until further order of this Court.

Witness, the Honorable Paul J. McCormick, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on October 24, 1940.

(Seal) R. S. ZIMMERMAN,
Clerk,

By M. M. Karcher,
Deputy Clerk.

[Endorsed]: Filed Oct. 24, 1940. [7]

[Title of District Court and Cause.]

CERTIFICATE ON REVIEW OF CONCILIATION COMMISSIONER'S ORDER OF JUNE 21st, 1944, DETERMINING VALUE OF REAL PROPERTY.

I, Fred Duffy, Conciliation Commissioner of above entitled Court, for the County of San Bernardino, State of California, before whom above entitled matter is pending under proceedings pursuant to the provisions of Section 75 of the Bankruptcy Act, do hereby certify.

That above named debtors filed in the office of the clerk of above entitled court their petition under Section 75 of the Bankruptcy Act, on the 25th day of July, 1940. That said petition was approved and the matter referred to Fred Duffy, Esq., Conciliation Commissioner, as aforesaid for further proceedings.

That debtors having failed to secure acceptance of composition and/or extension proposal by a majority in number and amount of their creditors, did on the 14th day of October, 1940, filed in the office of said clerk, their Amended Petition under sub Section (s) of Section 75 of the Bankruptcy Act. Debtors were adjudicated and matter referred to said Fred Duffy, Conciliation Commission, acting as Referee, for further proceedings.

That certain proceedings were had thereon and on the 23rd day of December, 1942, said debtors filed in the office of said Conciliation Commissioner, their petition requesting reappraisal of hearing to determine value of debtors real property. That hearing was had on said petition on the 3rd day of March, 1943, after numerous

continuances had been granted and on the 9th day of April, 1943, Commissioner entered an order determining the value of said real property, that said order was vacated and set aside on review and appeal.

That on the 2nd day of May, 1944, rehearing on petition to determine value of debtors real property, came on for hearing before this Conciliation Commissioner, present at said hearing, were debtors, and [8] their attorney, H. R. Griffin, Petitioning Creditor, Peter J. Wumkes, and his attorneys, Nichols-Cooper & Hickson, by Donald P. Nichols.

Oral testimony and documentary evidence being introduced, the matter was submitted for decision.

That on the 26th day of May, 1944, this commissioner rendered his decision and on the 14th day of June, 1944, findings of fact and conclusions of law, were filed and said findings of fact and conclusions of law were signed by said commissioner, on the 21st day of June, 1944. And on said 21st day of June, 1944, Order determining value was signed and entered by this commissioner.

That on the 30th day of June, 1944, petition for review of order determining value of debtors real property was filed by petitioning creditor in the office of said commissioner.

That the real property of debtors, subject of this certificate on review, consists of 5.78 acres of citrus property with no improvements on the land except the citrus trees.

That at the request of petitioning creditor, on review, I am attaching hereto a copy of the so called Stay and

rental order, bearing date the 16th day of June, 1941, and a copy of a report furnished petitioning creditor, herein and his attorneys, dated November 3rd, 1943.

It should be remembered that the proceeds shown by the report so furnished, represented the proceeds from the crops raised on the property involved in this petition or certificate and also on another piece or parcel of citrus property, consisting of 4.02 acres on which another person held encumbrance.

I further certify that all orders of this court have been fully complied with by above named debtors, including the said order referred to as Rental Order.

Questions Presented.

The questions presented by petition for review are

I.

Is there substantial evidence to sustain the Findings of Fact, [9] Conclusions of Law and Order of Conciliation Commissioner fixing value of real property, on which petitioning creditor holds encumbrance, at $5575.00.

II.

Is the encumbrance against real property controlling in determining value of said real property.

III.

Have debtors complied with the Orders of Conciliation Commissioner-Referee.

Papers Submitted.

For the Information of the Court, I am herewith submitting the following documents and exhibits.

1. Petition for reappraisal or hearing to determine value of debtors real property. (This petition was forwarded to the clerk of this court, attached to Conciliation Commissioner's certificate in a former review, and is now on file in the office of said clerk.)
2. Exhibits 4-8 and 9. (These exhibits are also part of the file in office of said clerk.)
3. Findings of Fact and Conclusions of Law.
4. Order determining value and Notice of entry of said Order.
5. Petition for Review of Order determining value of debtors real property.
6. Transcript of testimony taken at said hearing.
7. Decision of Conciliation Commissioner.
8. Copy of Report furnished Petitioning Creditor and Attorneys for petitioning creditor, dated November 3rd, 1943.
9. Copy of Order Setting Rentals, etc., dated June 16th, 1941.

Dated, San Bernardino, July 12th, 1944.

Respectfully submitted.

Fred Duffy FRED DUFFY

Fred Duffy,

Conciliation Commissioner-Referee.

[Endorsed]: Filed Jul. 14, 1944. [10]

[Title of District Court and Cause]

DECISION

This is the second hearing of Petition of Debtors to determine value of real property in the above entitled proceedings.

First hearing was held on 3rd day of March, 1943, rehearing granted and on the 2nd day of May, 1944, said rehearing held, before the undersigned Conciliation Commissioner.

Present at said hearing were debtors and their attorney, H. R. Griffin, Creditor, Peter J. Wumkes, and Nichols-Cooper & Hickson, by Donald P. Nichols, his attorney.

That in the course of said hearing of May 2nd, 1944, oral testimony and documentary evidence was introduced and the matter submitted for decision.

The documentary evidence consisting of exhibits 4—same being a plat of the property prepared by the witness and admitted at the former hearing on March 3rd, 1943, and exhibits 8 & 9, being photographs of property, made by witness, admitted in evidence at the former hearing of March 3rd, 1943. Said exhibits being now on file in the office of the Clerk of this Court.

The testimony presented by the debtors on said reappraisal hearing of May 2nd, 1944, was by persons having had several years of experience in appraisals.

Charles Aubrey, who has been engaged in appraising lands for over 25 years in different parts of the United States, including the counties of Ventura, Los Angeles, Orange, Riverside, San Bernardino, and other [11] coun-

ties in the State of California, who has appraised property for New York Life Insurance Company, on farm lands, has appraised property for Federal Land Bank, appeared as witness on appraisals in Federal Court, has been supervisor of Farm Security Administration, considering all the elements for fixing value, gave as his opinion, the value of the property in question as $5200.00.

W. H. Johnson, who has been in real estate and appraising business for over 20 years, was with the Redlands-Yucaipa Land Company, whose business was developing deciduous fruit land, subdivisions, operator of deciduous orchards for 30 years, has been appraiser on several occasions in the Superior Court, and this Court, after making a thorough study of the property in question, drawing a plat showing condition of trees situated thereon, taking photographs of trees and taking into consideration all the elements going to make up values in forming his opinion, places the market value of said property at $5400.00.

We also have the testimony of J. W. Mehl, who now is and since 1931, has been Inheritance Tax Appraiser of the State of California, in and for the County of San Bernardino, has appraised considerable citrus property and other property during the 13 years as such Inheritance Tax Appraiser. This witness arrived at an appraisal of said property, based upon a consideration of all the elements which should enter therein, as $5575.00.

Lyman M. King, a witness called on behalf of creditor, has been president of Redlands Federal Savings and Loan Association, since 1931. He formerly acted as State Inheritance Tax Appraiser, and did some appraisal work at that time, but as president of Redlands Savings & Loan

Association, (which he is now engaged in) does not go into the orange growing business particularly, they deal in houses and lots almost exclusively, his main business is loaning money on houses and does not involve lending of money on citrus groves, except occasionally when there might be a home on a citrus grove. He viewed the property in question four years ago and again on the 29th day of April, 1944, (Saturday afternoon) he [12] places the value of said property in the sum of $11,912.50.

Fred Brock, witness on behalf of creditor, testified, that his business or occupation was orange growing and real estate and dry farming. That he had been engaged in real estate business since 1927, off and on during that time, that he owned some properties, that as a real estate broker has sold a number of properties, that he knows available purchasers for property in question, that he fixed the value of said property at the sum of $12,000.00, with heating equipment, without heating equipment included he fixed the value at $11,000.00, and knows an available purchaser for the property at that price, that he would be willing to guarantee a sale of said property at that price within a period of thirty days.

That no place in his testimony does he show where he has ever acted as appraiser for any organization, bank, corporation or individual, he testifies that buyers in most cases to-day, never question what the best production is, it is "can I have the property."

J. H. Nicholson, witness on behalf of debtors, testified that he is assistant secretary of the Redlands Heights Groves, and has been since 1927, that he is familiar with the property in question and gives as his opinion the

value of said property in the sum of $6000.00, he said that, that is what it would be worth to him and that he, at that price, thinks he could work it out in a number of years. This witness does not show any experience as an appraiser.

Ted Pratt, called on behalf of creditor, testified that he works in the field for the Orange Belt Fruit Distributers of Pomona, who are packers and shippers and growers of citrus fruit, and has been in the position for three years. He was salesman of automobiles from 1930 to 1940, that he owns citrus properties, that his experience as an appraiser is in his present position to appraise crops and groves for the growers of his company, does not appraise for the purpose of sale or buying, but for company protection in advances on various crops. That he was on said property one time for a period of possibly two hours, that his visit to [13] said property was on May 1st, 1944, that he is licensed as growers service advisor, that the reasonable market value in his opinion of said property is $21,000.00. When asked to explain what he meant by reasonable market value, he answered "—well, the use of the land for its most practical purpose and the value of the trees and water stock. It is not its potency, particularly, but its production. I investigated the crop record."

Peter J. Wumkes, called as a witness on behalf of himself, the creditor, testified that the property in question was of the value of somewhere between $13,000.00 and $15,000.00. Question

"Q. What, in your opinion, is the market value of this property?

A. Well, I offered to take the property back—"

Another question.

> "Q. Would you be willing to take this property and cancel the indebtedness that you hold against it?" Objected to and sustained.

It is not difficult to conclude what the answer of witness would have been had he been allowed to answer.

It is obvious from the testimony quoted, that this witness, Peter J. Wumkes, creditor and holder of encumbrance on the property in question, is desirous of regaining possession of said property.

Witness further testified that he had been in Redlands twice in nearly three years, had inspected the property on each occasion. First inspection on Thursday, April 29th, 1944, and again yesterday, which wouuld be May 1st, 1944.

K. C. O'Bryan, witness called on behalf of creditor, testified that he was with the Southern Citrus Association, a packing house located in Redlands, and had been connected with said packing house for seven years. That he individually and as a partner is owner of seven parcels of citrus property, has known the property in question since 1936, at which time he was handling the fruit on said property, but does not remember when he last handled the fruit. Defines market value as—"I would think it would mean the price that a grove could be sold for and a buyer could be [14] found within a reasonable time."

He does not testify that he has ever acted as appraiser or had any experience in appraisal work. He gives as

his opinion the value of the property in question, $12,-500.00. During his testimony he was asked

"Q. What, in your opinion, is the reasonable market value of that property?

A. I think it is worth $12,500.00, however, I come over here prepared to make an offer of $10,-000.00 for it, all cash.

"Q. So that your valuation without the crop at this time is $9000.00?

A. Yes, but I am willing to pay $10,000.00 with the crop."

"Mr. Nichols: Q. Are you prepared at this time to make a cash offer for the purchase of this property? A. I am."

Objection interposed by attorney for debtors, following said objection

"Mr. Nichols: At this time I would like to offer proof by a cash offer and will tender proof of a cash offer in the amount of $10,000.00, for this property and tender herewith cash in the amount of $50 and a certified check in the amount of $950, being ten percent of the amount of the offer. I am handing that over to you at this time, Mr. Duffy."

After argument of counsel and ruling of commissioner, the objection to offer having been sustained, the following was addressed to the Court:

"Mr. Nichols: If you are refusing to entertain the offer in any way—

The Court: I have sustained the objection to the offer."

Paragraph 3 of Sub Section (s) of Section 75 of the Bankruptcy Act, contains a proviso as follows:

> "That upon request of any secured or unsecured creditor, or upon request of the debtor, the Court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the Court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor." [15]

The second proviso provides:

> "That upon request in writing by any secured creditor *of* creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction.
>
> The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this Act."

In view of the foregoing, this commissioner is constrained to the opinion, that the offer of purchase made by witness K. C. O'Bryan, was inadmissible.

No authority in the Act is given the court to sell the property of debtor except at public auction and that, only

after debtor has been given the opportunity to comply with the first proviso of paragraph, 3, supra.

Wright vs. Central Life Insurance Co., C. C. H. 52,826, decided by the Supreme Court of the United States on December 9th, 1940.

The court has also given its views on introduction of evidence on offer to purchase, in Sharp vs. United States, 191 U. S. 341, 48 Law. Ed. 211.

The testimony in the case at bar discloses a very wide difference of opinion as to the value of the property in question.

On the one hand we have witnesses on behalf of debtors, who have had years of experience in appraising real property, the nature of property involved here, including State Inheritance Tax Appraiser, of the county in which said property is situated, these witnesses arrive at their conclusions of value after viewing the property, testing the soil, preparing plat showing position of and condition of trees, taking photographs of trees and taking into consideration all the elements which enter into the determination of value.

On the other hand we have witnesses on behalf of creditor, which with one exception, have had no experience in appraisals, nor have they shown any knowledge of elements going to make up value, the exception is [16] Mr. King, who states, that his appraising does not involve citrus groves unless there might be a home on a citrus grove on which his company lends money.

After duly considering all the evidence adduced at the hearing, the reading of the transcript, considering the qualifications of witnesses produced, and being fully advised in the premises, I have reached the conclusion that the value of debtors property involved in this hearing, on which Peter J. Wumkes, creditor, has encumbrance, is of the value of $5575.00.

Debtors may redeem said property by paying into the court, the said sum of $5575.00, on or before three months from the date of the order fixing value is made.

Provided however, in case order fixing the value, is appealed from, debtors may redeem said property by paying into court, the said sum of $5575.00, on or before three months from the date order on appeal, becomes final.

Attorney for petitioning debtors will prepare appropriate Findings, Conclusions and Order.

Dated, San Bernardino, California, this 26th day of May, 1944.

Fred Duffy FRED DUFFY
Fred Duffy,
Conciliation Commissioner-Referee.

[Endorsed]: Filed Jul. 14, 1944. [17]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Petition of the above-named debtors requesting a court reappraisal or hearing to determine value of debtors' real property having been duly filed on to-wit, the 23rd day of December, 1942, after several continuances, was first heard on the 3rd day of March, 1943, and now pursuant to the Order of the District Court, affirmed by the Circuit Court, comes on regularly for hearing after due and regular notice being given, on the 2nd day of May, 1944, at the hour of 10:00 a. m. thereof, before the Honorable Fred Duffy, Conciliation Commissioner of the above-entitled Court, in and for the County of San Bernardino, State of California, and there appearing said debtors personally and through their attorney, H. R. Griffin, Esq.; and Peter J. Wumkes, appearing personally and through his attorney, Nichols, Cooper & Hickson, by Donald P. Nichols, Esq.; and no appearance being made either in person or by counsel for any other creditor scheduled in the above proceeding; and evidence both oral and documentary having been introduced and witnesses examined on behalf of the debtors and the appearing creditors, and said hearing having been concluded and submitted, and the Court being fully advised of the law and the evidence in the premises, and after due consideration and deliberation thereon, makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

The court finds that said debtors on or about the 25th day of July, [18] 1940, filed their joint Petition in the above-entitled court, praying for relief as provided for in Section 75 of the Bankruptcy Act; that the filing of said Petition was approved by the above-entitled court and referred to Fred Duffy, Esq., Conciliation Commissioner, for further proceedings.

II.

That on or about the 25th day of October, 1940, said petitioners having been unable to secure acceptance or confirmation of their extension proposal, filed their amended Petition and were adjudicated bankrupts in accordance with the provisions of Section 75(s) of the Bankruptcy Act, and that the above-entitled matter was referred to the Honorable Fred Duffy, Conciliation Commissioner, for further proceedings; and that thereafter and on the 16th day of June, 1941, said Honorable Fred Duffy, Conciliation Commissioner, made and entered an Order setting aside the exempt properties to said debtors, giving said debtors possession of their properties for a period of three years, and setting the rental to be paid by said debtors.

III.

That the court further finds that scheduled by said debtors in their schedules was the following described real property owned by said debtors and situated in the County of San Bernardino, State of California, and more particularly described as follows. to-wit:

That property in the City of Redlands, County of San Bernardino, State of California, described as:

That portion of the Northwest quarter (NW¼) of the Southeast quarter (SE¼) of Section 21, Township 1 South, Range 3 West, San Bernardino Base & Meridian, described as:

Beginning on the North line of said Northwest quarter (NW¼) of Southeast quarter (SE¼) 1008.87 feet East of the Northwest corner of said Southeast quarter (SE¼); thence South along the East line of land of Israel Beal, 853.33 feet to a point 466.67 feet North of the South line of said Northwest quarter (NW¼) of the Southeast quarter (SE¼); [19] thence West 342 feet; thence North and parallel with first course herein, 853.33 feet; thence East 342 feet to beginning; Except that Portion conveyed to the Lugo Water Company by Deed recorded in Book 438 of Deeds, at page 384 described as follows: Commencing at the Northeast corner of the Southeast quarter (SE¼) of said section; thence West along the center line of Lugonia Avenue, 1716 feet for point of beginning; thence South 0° 12′ East 48 feet; thence West 55 feet; thence North 0° 12′ West 48 feet; thence East 55 feet to the place of beginning. Together with Four (4) shares of the capital stock of Lugo Water Company, a corporation.

IV.

That the Court finds that on or about the 23rd day of December, 1942, the said petitioners filed their joint Petition requesting reappraisal or hearing to determine value of debtors' real property.

V.

That the Court further finds that the debtors' real property originally consisted of two parcels of land, each

adjoining the other and being planted to citrus, the one parcel of land being known as the Clark property having a small house, garage, and an unoccupied poultry building thereon, which said property has, in accordance with the Order of the Court, been redeemed by said debtors and is now their property. That the remaining parcel of land is the one encumbered with a Trust Deed in favor of the creditor, Peter J. Wumkes, and as described hereinabove, and consists of approximately five and seven-eights (5-7/8) acres.

VI.

That the Court further finds that said parcel of land as described in Paragraph III hereof, is entirely planted to citrus containing approximately 798 trees, being divided as follows: approximately 95 young Valencia trees, being eight (8) to ten (10) years old, 399 old Valencia trees, and 304 Navel trees, including some five (5) Grapefruit trees; that these trees are set too closely together, being less than [20] twenty (20) feet apart, both for purposes of ready cultivation and also to permit access for sunlight; that this property has a gravelly soil and that as you travel from the front of said grove back towards the rear, there is to be noted increasing signs and indications that a stream or wash has traversed the rear of the grove, and this condition of the soil is reflected in the poor condition of the grove; there being a large number of stunted trees located particularly in the rear of said grove; that said entire grove is considered a marginal grove. That said grove is furnished with water, as represented by four (4) shares of Lugo Water.

VII.

That the Court finds that the production of citrus fruit is the highest and best use for said real property.

VIII.

The Court further finds that the grove has had proper care and attention and has been efficiently handled and that the poor condition of the grove is directly attributable to the poor condition of the soil and the spacing or planting of the trees upon the property. The Court further finds that the crop records are available and were introduced in the prior hearing before this Court.

IX.

That there has been picked in this year 1159 boxes of Navels and there is now an estimated number of 1500 boxes of Valencias on the grove, however, that the total crop produced last year was some 700 boxes.

X.

The Court further finds that there have been a number of sales made in that district within a recent period and under varying terms and conditions, which conditions and terms were dissimilar to the ones present in this case.

XI.

The Court further finds that during the course of this period a [21] witness testified that he considered the market value of the property to be $12,500.00, including the crop, and that counsel for the Creditor, Peter J. Wumkes, then offered proof of a cash offer in the sum of $10,000.00 for the property, tendering therewith cash

in the amount of $50.00 and a certified check in the amount of $950.00, being ten (10%) per cent of the amount of the offer; that said offer was held by the Court to be inadmissible, there being no authority given under the act to permit the Court to sell the property of the debtors, except at public auction and then only after the debtors had been given an opportunity to comply with the first provisions of Paragraph III of subsection (s) of Section 75 of the Bankruptcy Act and in accordance with Wright vs. Central Life Insurance Company, CCH 52,826, decided by the Supreme Court of the United States on December 9, 1940, and that also such an offer of purchase under the language of Sharp vs. U. S., 191 U. S. 341; 48 Law. Ed. 211 is inadmissible and is at most indirect evidence of the opinion of the person making the offer, which opinion may have been based upon very slight knowledge, or a desire to purchase the land for some particular purpose disconnected from its value, or pure speculation and it is almost impossible to prove the lack of good faith of the person making the offer. The Court, therefore, found that said offer was impossible to complete and by reason of the law and the testimony of the witnesses was based upon pure speculation and that said offer was to purchase said property for a particular purpose; and further found that the element of good faith in said offer was very questionable and the Court thereupon rejected said offer.

XII.

The Court found that the total value of the Wumkes' property, which said property is hereinabove specifically described in Paragraph III hereof, and on which Jeter J. Wumkes has an encumbrance, is of the value of $5,575.00.

Conclusions of Law

I. [22]

That the value of the Wumkes' property, as specifically described in Paragraph III of the Findings herein, and on which said Peter J. Wumkes has an encumbrance, is of the value of $5,575.00.

II.

That said debtors may redeem said real property by paying into Court said sum of $5,575.00 on or before three (3) months from the date of the Order fixing value is made; provided, however, in case the Order fixing value is appealed from, said debtors may redeem said property by paying into Court, the said sum of $5,575.00 on or before three (3) months from the date said Order on Appeal, becomes final.

Dated this 21st day of June, 1944.

FRED DUFFY
Fred Duffy
Conciliation Commissioner-Referee.

[Endorsed]: Filed 6/14/44 at 45 min. past 11 o'clock a. m. Fred Duffy, Concil. Comm.

[Endorsed]: Filed Jul. 14, 1944. [23]

[Title of District Court and Cause.]

ORDER DETERMINING VALUE OF DEBTORS' REAL PROPERTY

The Petition of the above-named debtors requesting a court reappraisal or hearing to determine value of debtors' real property having been duly filed on to-wit, the 23rd day of December, 1942, after several continuances, was first heard on the 3rd day of March, 1943, and now pursuant to the Order of the District Court, affirmed by the Circuit Court, comes on regularly for hearing after due and regular notice being given, on the 2nd day of May, 1944, at the hour of 10:00 a. m. thereof, before the Honorable Fred Duffy, Conciliation Commissioner of the above-entitled Court, in and for the County of San Bernardino, State of California, and there appearing said debtors personally and through their attorney, H. R. Griffin, Esq.; and Peter J. Wumkes appearing personally and through his attorney, Nichols, Cooper & Hickson, by Donald P. Nichols, Esq.; and no appearance being made either in person or by counsel for any other creditor scheduled in the above proceeding; and evidence both oral and documentary having been introduced and witnesses examined on behalf of the debtors and the appearing creditors, and said hearing having been concluded and the cause having been argued by respective counsel and submitted, and the court having duly made and entered its Findings of Fact and Conclusions of Law.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

I.

That the value of the Wumkes' property is of the value of Five [24] Thousand Five Hundred Seventy-five ($5,575.00) Dollars. Said property being and hereinafter more specifically described is the property on which the said Peter J. Wumkes has an encumbrance.

II.

That said debtors may redeem said real property by *pay* into Court said sum of $5,575.00 on or before three (3) months from the date of the Order fixing value is made; provided, however, in case the Order fixing value is appealed from, said debtors may redeem said property by paying into Court, the said sum of $5,575.00 on or before three (3) months from the date said Order on Appeal, becomes final.

III.

That said property upon which Peter J. Wumkes has an encumbrance is situate in the County of San Bernardino, State of California, and more particularly described as follows, to-wit:

That property in the City of Redlands, County of San Bernardino, State of California, described as:

That portion of the Northwest quarter (NW¼) of the Southeast quarter (SE¼) of Section 21, Township 1 South, Range 3 West, San Bernardino Base & Meridian, described as:

Beginning on the North line of said Northwest quarter (NW¼) of Southeast quarter (SE¼) 1008.87 feet East of the Northwest corner of said Southeast quarter (SE¼); thence South along the East line of land of Israel Beal, 853.33 feet to a point 466.67 feet North of the South line of said Northwest quarter (NW¼) of the Southeast quarter (SE¼); thence West 342 feet; thence North and parallel with first course herein, 853.33 feet; thence East 342 feet to beginning; except that portion conveyed to the Lugo Water Company by Deed recorded in Book 438 of Deeds, at page 384 described as follows:

Commencing at the Northeast corner of the Southeast quarter (SE¼) of said section; thence West along the center line of Lugonia Avenue, 1716 feet for point of beginning; thence South 0° 12′ East 48 feet; thence West 55 feet; thence North 0° 12′ West 48 feet; thence East [25] 55 feet to the place of beginning. Together with Four (4) shares of the capital stock of the Lugo Water Company, a corporation.

Dated this 21st day of June, 1944.

FRED DUFFY
Fred Duffy
Conciliation Commissioner-Referee.

[Endorsed]: Filed 6/21/44 at 15 min. past 10 o'clock a. m. Fred Duffy, Concil. Comm.

[Endorsed]: Filed Jul. 14, 1944. [26]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF "ORDER DETERMINING VALUE OF DEBTORS' REAL PROPERTY

Comes now, Peter J. Wumkes, secured creditor of the above named bankrupts, and the owner of the note and deed of trust covering certain of the bankrupts' real property, and files this Petition for Review of the Order of the Honorable Fred Duffy, Conciliation Commissioner of San Bernardino County, dated the 21st day of June. 1944, and entitled "Order Determining Value of Debtors' Real Property":

I.

Your petitioner alleges that he is the owner of a promissory note, executed by the debtors, and having a present unpaid balance in excess of $13,000.00, which said promissory note is secured by a deed of trust shown in Schedule B(1) of the Schedules of the Bankrupts on file herein: that your petitioner has filed his proof of secured debt in these proceedings, which proof of debt has been duly approved and allowed.

II.

These proceedings were instituted on the 25th day of July, 1940, under Section 75 of the Bankruptcy Act, and thereafter, the matter was referred to Honorable Fred Duffy, Conciliation Commissioner of San Bernardino County. On or about the 25th day of October, 1940, the debtors in said proceeding filed their amended petition seeking to be adjudicated bankrupts, and said debtors were duly adjudicated bankrupts under the provisions of sub-section S of Section 75 of the Bankruptcy Act. Thereafter, and on or about the 16th day of June, 1941, the Conciliation Commissioner of San Bernardino County

made and entered his Order staying proceedings for a period of three years, and [30] setting as rental during such period, one-fourth of the gross proceeds of all agricultural income produced on the real property of the above named bankrupts, said rent to be paid annually, commencing June 16th, 1942. Your petitioner has not received any rent whatever pursuant to said rent order, either from the Conciliation Commissioner or the bankrupts, and in that connection, petitioner alleges on information and belief that the said rent order has not been honored with compliance, and is now in default, and has at all times mentioned herein, been in default.

III.

On or about the 23rd day of December, 1942, the bankrupts filed a petition with the Conciliation Commissioner of San Bernardino County, requesting a hearing to determine the value of the real property set forth in their Schedule, and upon which your petitioner held an encumbrance in the form of the deed of trust hereinbefore described. Said matter was determined in the month of March, 1943, and thereafter, a review was taken by your petitioner, resulting in a reversal of the Order of the Conciliation Commissioner made in March of 1943, and the affirmance of said reversal by the Ninth Circuit Court of Appeals following an appeal of said reversal by the bankrupts. Said matter came on for hearing pursuant to the Order of the District Court reversing the former decision of the Conciliation Commissioner of San Bernardino County on the 2nd day of May, 1944, before the Honorable Fred Duffy, Conciliation Commissioner of said County, and thereupon evidence was introduced before the Conciliation Commissioner showing the value of the real property to have been approximately $12,000.00,

and your petitioner personally values the said property between $13,000.00 and $15,000.00, but that the Conciliation Commissioner has made an Order permitting the bankrupts to obtain the said real property, free and clear of your petitioner's encumbrance, by paying the sum of $5,575.00. Petitioner hereby refers to the Order and Findings made by the Conciliation Commissioner of San Bernardino County, and by such reference [31] includes the same herein, as if set forth in this petition verbatim.

IV.

That the Order of the Conciliation Commissioner of San Bernardino County is contrary to the evidence and against law and constitutes the taking of petitioner's property without due process of law, and without adequate compensation therefor. Your petitioner alleges that his rights have been violated in the Findings and Order made by the Conciliation Commissioner holding the property to have a value of $5,575.00, and that, in truth and in fact, the said property has a value of at least $12,000.00. Your petitioner alleges that his rights have been violated, in that the Order of the Conciliation Commissioner attempts to give to the bankrupts herein the right to obtain the property, free and clear of your petitioner's encumbrance, having a present balance in excess of $13,000.00, for the sum of $5,575.00, when, in truth and in fact, the property has a value of at least $12,000.00. Your petitioner alleges that his rights have been violated, in that the Findings and Judgment made by the Conciliation Commissioner of San Bernardino County result in a gross miscarriage of justice, and result in the taking of petitioner's property without adequate compensation therefor, and in violation of the Due Process Clause of the

United States Constitution. Your petitioner alleges that his rights have been violated, in that the Findings and Decision of the Conciliation Commissioner of San Bernardino County are contrary to the evidence of value introduced before him at said hearing, and are based upon improper conclusions drawn from such evidence, and upon evidence of value based upon inadequate and improper factors in determining value.

V.

Your petitioner requests that a Certificate of Review be prepared by the Conciliation Commissioner of San Bernardino County, and that he transmit with such Certificate of Review, the original Findings and Order herein sought to be reviewed, the original transcript of testimony, prepared and now in the hands of said Conciliation Commissioner, [32] the Order for the payment of rent dated June 16, 1941, and this Petition for Review.

Petitioner prays that the Order of June 21, 1944 be reviewed, in accordance with the provisions of the Bankruptcy Act, and upon such review, that said Order be amended, modified or set aside, as to the Court may seem meet and equitable.

Dated: June 30, 1944.

PETER J. WUMKES,
Petitioner

By Nichols, Cooper & Hickson and
C. P. Von Herzen,
his attorneys,

By Donald P. Nichols
Donald P. Nichols.

[Verified.]

[Endorsed]: Filed 6/30/44 at 30 min. past 10 o'clock a. m. Fred Duffy, Concil. Comm.

[Endorsed]: Filed Jul. 14, 1944. [33]

[Title of District Court and Cause.]

NOTICE OF HEARING OF CONCILIATION COMMISSIONER'S CERTIFICATE ON REVIEW

To Nichols, Cooper & Hickson, and C. P. Von Herzen, Attorneys for Petitioner on Review; and H. R. Griffin, Attorney for Bankrupts:

You, and each of you, will please take notice that on the 18th day of September, 1944, at the hour of 10 o'clock a. m., or as soon thereafter as counsel can be heard, a hearing will be had before the Hon. Paul J. McCormick, in his court room No. 8, in the Federal Building, Los Angeles, California, on the Conciliation Commissioner's Certificate on Petition for Review of Order Determining Value of Debtors' Real Property, filed with the Clerk of the above entitled Court on July 14, 1944.

Dated: September 6, 1944.

EDMUND L. SMITH,
Clerk

By E. M. Enstrom, Jr.
E. M. Enstrom, Jr.,
Deputy Clerk.

Mailed copies of notice to above-named counsel & Fred Duffy, Conciliation Commissioner on 9-6-44. E. M. Enstrom, Jr., Deputy.

[Endorsed]: Filed Sep. 6, 1944. [34]

[Title of Cause.]

AFFIDAVIT IN RE APPRAISAL OF PROPERTY

State of California
County of Los Angeles—ss

Donald D. Wyllie, being first duly sworn, deposes and says:

That he is engaged in the business of packing and shipping of citrus fruits; that he has lived in the Redlands citrus district for the past twenty years; that during recent years he has bought and sold two groves in the general vicinity of the grove owned by James Goodwin Powell and Anna Straechan Powell upon which Peter J. Wumkes holds a note secured by Deed of Trust; that he is familiar with recent purchases and sales of citrus properties in the vicinity of the Powell grove; that he has, within the past ten days, appraised the property of Mr. and Mrs. Powell consisting of approximately 5.7 acres of land being improved with 798 citrus trees of which 494 are valencias and 304 navels; that he is familiar with the value of properties in the immediate locality of the Powell property and is also familiar with the value of the Powell property as it has existed during the past six months.

That based upon said experience and familiarity with the market value of citrus properties in the vicinity of the Powell grove, this affiant fixes the reasonable value of

said property at the sum of $13,000.00; that there is at the present time, set upon said property, a crop which affiant estimates to be approximately 3,000 boxes; that based on the assumption that the fruit will bring prices equivalent to the existing ceiling, affiant estimates the present crop now on said property, to return between $5,000.00 and $5,500.00.

That affiant is familiar with demands for citrus properties and knows of numerous available purchasers for said property and alleges the fact to be that said property can be sold at forced sale for the sum of $9,000.00.

Dated this 16th day of September, 1944.

DONALD D. WYLLIE
Affiant

Subscribed and sworn to before me this 16th day of September, 1944.

(Seal) Alice M. Kesterson
Notary Public in and for said County and State.

[Endorsed]: Filed Sep. 23, 1944. [35]

[Title of Cause.]

AFFIDAVIT IN RE APPRAISAL OF PROPERTY

State of California
County of Los Angeles—ss.

L. A. Turner, being first duly sworn, deposes and says:

That he is engaged in the business of growing, packing and shipping of citrus fruits; that he is the co-owner of approximately 500 acres of citrus properties; that in connection with the operation of his business, he has made hundreds of inspections and appraisals of citrus properties and is familiar with the market value of properties in the location of the James Goodwin Powell citrus property at Redlands, California.

That he is familiar with the value of the Powell property and knows of numerous persons interested in the purchase of said property; that the reasonable market value of said property is the sum of $12,500.00.

That your affiant would be willing, upon the expectation of reselling said property immediately at a considerable profit, to offer at this time the sum of $9,000.00 cash for the immediate purchaser of said property, and herewith makes such an offer.

Dated this 16th day of September, 1944.

L. A. TURNER

Subscribed and sworn to before me this 16th day of September, 1944.

(Seal) Alice M. Kesterson
Notary Public in and for said County and State.

[Endorsed]: Filed Sep. 23, 1944. [36]

United States District Court
Southern District of California
Central Division

No. 36775-C Bankruptcy

In the Matter of

JAMES GOODWIN POWELL and
ANNA STRACHAN POWELL,
husband and wife,

Debtors.

MINUTE ORDER

The objections of farmer-debtors to the affidavits of Donald D. Wyllie and L. A. Turner are overruled and said affidavits are filed and considered herein.

(Entered on Judge McCormick's Minutes September 23, 1944.) [37]

United States District Court
Southern District of California
Central Division

No. 36775-C Bankruptcy

In the Matter of

JAMES GOODWIN POWELL and
ANNA STRACHAN POWELL,
husband and wife,

Debtors.

MEMORANDUM AND RULING VACATING COMMISSIONER-REFEREE'S ORDER DETERMINING VALUE OF DEBTORS' REAL PROPERTY.

Upon consideration of the entire record in this review we find that the commissioner-referee prejudicially erred in failing to consider evidence of other sales of comparable property and, particularly, in failing to consider evidence of a cash offer of $10,000.00 for the property in question tendered during the hearing before the commissioner-referee to fix the value of the farmer-debtors' property pursuant to Section 75(s)(3) of the Act.

The proffered evidence of the cash offer of $10,000.00 undoubtedly was one of the major factors supporting the petitioner's contention as to the market and fair value of the property in issue, and the action of the commissioner-referee wholly rejecting any consideration of this sub-

stantial and firm good faith commitment was clearly erroneous and shows that the issue of value has not been competently tried and determined. See Kauk v. Anderson, (C. C. A. 8), 137 F. 2d 233.

The error of law is sufficiently disclosed by the record transmitted by the commissioner-referee with his certificate and decision, but the serious and unfair aspect of the value fixed by the commissioner-referee is manifested by further evidence submitted by affidavits offered at the hearing of this review before the judge. Such evidence is properly receivable and the objections of the farmer-debtor to it are overruled. Carter v. Kubler, 320 U. S. 243; Powell v. Wumkes, (C. C. A. 9), 142 F. 2d 4; Rhodes v. Federal Land Bank, (C. C. A. 8), 140 F. 2d 612; General Order 47, Title 11 U. S. C. A., page 115.

The conciliation commissioner-referee's findings of fact XI, the conclusions of law and the order of the conciliation commissioner-referee determining value of debtors' real property, dated June 21, 1944, are vacated, set aside and annuled. Inasmuch as the competent evidence [38] pertinent to properly redetermining the value of farmer-debtors' property is more readily and economically producible before the conciliation commissioner-referee than before this court, this entire matter is recommitted to Conciliation Commissioner Referee Duffy of San Bernardino, California, with instructions to, with reasonable celerity set for hearing upon appropriate notice and with dispatch to conduct the hearing and determine the fair value of

farmer-debtors' property involved, in accordance with the views expressed in this memorandum and pursuant to law. Exceptions allowed.

Dated September 23, 1944.

PAUL J. McCORMICK
United States District Judge.

Judgment entered Sep. 23, 1944. Docketed Sep. 23, 1944. Book 28, page 131. Edmund L. Smith, Clerk, by B. B. Hansen, Deputy.

Notation made in Bankruptcy Docket on Sep. 23, 1944 pursuant to Rule 79(a), Civil Rules of Procedure. Edmund L. Smith, Clerk U. S. District Court, Southern District of California, by B. B. Hansen, Deputy.

[Endorsed]: Filed Sep. 23, 1944. [39]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the United States Circuit Court of Appeals for the Ninth Circuit Court for Rule 73(b).

Notice is hereby given that, James Goodwin Powell and Anna Stratchan Powell, husband and wife, debtors in the above bankruptcy proceeding, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment of the Honorable Paul J. McCormick, Judge of the United States District Court, made, entered and filed in the records of the above said Court on the 23rd day of September, 1944, vacating, setting aside and annuling the Conciliation Commissioner-Referee's Finding of Fact XI, the Conclusions of Law, and the Order of the Conciliation Commissioner-Referee determining value of Debtor's real property, dated June 21, 1944, and from each of them.

Dated this 19th day of October, 1944.

H. R. GRIFFIN
Attorney for Debtors and Appellants.

Notice is further given that the parties interested in this Appeal are Peter J. Wumkes, represented by Messrs. Nichols, Cooper & Hickson, 412-418 First National Bank Building, Pomona, California, and C. P. Von Herzen, 453 South Spring Street, Los Angeles, California, Attorneys at Law.

[Endorsed]: Filed Oct. 19, 1944 & mailed copy not. of appeal to Nichols, Cooper & Hickson & C. P. Von Herzen. [40]

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Know All Men by These Presents, that the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto Peter J. Wumkes, in the penal sum of Two Hundred Fifty and No/100 – – Dollars ($250.00), to be paid to the said Peter J. Wumkes, his successors or assigns, or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents.

The Condition of the Above Obligation Is Such, that

Whereas, Jame*d* Goodwin Powell and Anna Strachan Powell, husband and wife, have appealed, or are about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from an Order and Judgment of the Honorable Paul J. McCormick, Judge of the United States *Circuit* Court, made, entered and filed in the records of the above said Court on the 23rd day of September, 1944, vacating, setting aside and annulling the Conciliation Commissioner-Referee's Findings of Fact XI, the Conclusions of Law, and the Order of the Conciliation Commissioner-Referee determining value of Debtors' real property, dated June 21, 1944, and from each of them, in the above entitled action.

Now, Therefore, if the above named Appellants, James Goodwin Powell and Anna Strachan Powell, husband and wife, shall prosecute said appeal to effect and answer all costs which may be adjudged against them if the appeal is dismissed, or the Order affirmed, or such costs as the Appellate Court may award if the Order is modified, or in any other event, then this obligation shall be void; otherwise to remain in full force and effect. [41]

It Is Hereby Agreed by the Surety that in case of default or contumacy on the part of the Principals or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation, and award execution thereon.

Signed, sealed and dated this 19th day of October, 1944.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND

By Robert Hecht
Robert Hecht—Attorney in Fact

(Seal) Attest S. M. Smith
S. M. Smith—Agent

H. R. GRIFFIN
Attorney

Approved this ..... day of ....., 1944.

.....

State of California,
County of Los Angeles—ss:

On this 19th day of October, 1944, before me, Theresa Fitzgibbons, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Robert Hecht known to me to be the Attorney-in-Fact and S. M. Smith known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit Company of Maryland thereto and their own names as Attorney-in-Fact and Agent, respectively.

(Seal) THERESA FITZGIBBONS

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires May 3, 1946.

The premium charged for this bond is $10.00 Dollars per annum.

[Endorsed]: Filed Oct. 19, 1944. [42]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between H. R. Griffin, Esq., attorney for James Goodwin Powell and Anna Strachan Powell, husband and wife, as Debtors, and Messrs. Nichols, Cooper & Hickson and C. P. Von Herzen, Esq., attorneys for Peter J. Wumkes, that, in addition to the record as shown by the transcripts and other documents that the debtors James Goodwin Powell and Anna Strachan Powell admitted at the oral argument before Judge Paul J. McCormack, that the creditor, Peter J. Wumkes, had received nothing since the original filing of the debtors' petition in this proceeding, and that the record on appeal may include this stipulation.

Dated: December 11th, 1944.

H. R. Griffin,
H. R. Griffin,
Attorney for Debtors and Appellants.

Messrs. Nichols, Cooper & Hickson and C. P. Von Herzen,

By: C. P. Von Herzen
C. P. Von Herzen

Attorneys for Creditor and Respondent.

It is so ordered.

Ben Harrison
Judge

[Endorsed]: Filed Dec. 12, 1944. [49]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 49 inclusive contain full, true and correct copies of Debtors' Petition under Section 75 of the Bankruptcy Act; Approval of Debtors' Petition and Order of Reference; Amended Petition; Certificate of Conciliation Commissioner; Adjudication, Order of Reference and Temporary Restraining Order; Certificate on Review of Conciliation Commissioner's Order of June 21st, 1944 Determining Value of Real Property; Decision; Findings of Fact and Conclusions of Law; Order Determining Value of Debtor's Real Property; Debtors' Exhibits 4, 8 and 9; Petition for Review of Order Determining Value of Debtors' Real Property; Notice of Hearing of Conciliation Commissioner's Certificate on Review; Affidavit of Donald D. Wyllie in re Appraisal of Property; Affidavit of L. A. Turner in re Appraisal of Property; Minute Order Entered September 23, 1944; Memorandum and Ruling Vacating Commissioner-Referee's Order Determining Value of Debtors' Real Property; Notice of Appeal; Undertaking for Costs on Appeal; Statement of Points on Appeal; Designation of Portions of Record to be Contained in Record on Appeal; Affidavit of Mailing; Stipulation and Order re use of Original Reporter's Transcript; Affidavit; Order Extending Time to

Docket Appeal and Stipulation and Order filed December 12, 1944, which, together with Original Reporter's Transcript transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $19.55 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 15 day of December, 1944.

[Seal]

EDMUND L. SMITH,
Clerk

By Theodore Hocke
Deputy Clerk.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT.

The above entitled matter coming on regularly for hearing on May 2, 1944, at 10 o'clock A. M., before Hon. Fred Duffy, Conciliation Commissioner, at San Bernardino, California, in Room 204 in the Katz Building, the petitioner being represented by Messrs. Nichols, Cooper & Hickson, by Don. P. Nichols, Esq., and C. P. Von Herzen, Esq., and the debtor being represented by H. R. Griffin, Esq., the following testimony and proceedings are had and taken.

Mr. Duffy: This is the time and place set for hearing to determine the value of real property of James Goodwin Powell and Anna Strachan Powell. Are you ready to proceed?

Mr. Nichols: We are ready.

Mr. Griffin: We are ready. [1*]

Mr. Duffy: Is it understood that because of the fact that your attorney, Mr. Von Herzen, is not here that you are still ready to proceed?

Mr. Nichols: We are ready to proceed.

Mr. Duffy: It is ordered that Paul C. Lynde is appointed Official Reporter to take the testimony and transcribe the same and furnish a copy to the Court. The parties in interest may make their own arrangements for copies.

*Page number appearing at foot of Reporter's Transcript.

CHARLES AUBREY,

called as a witness by the debtor, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Griffin: Q. State your name.

A. Charles Aubrey.

Q. Where do you reside, Mr. Aubrey?

A. In Riverside.

Q. What is your business or occupation?

A. Real estate and appraising.

Q. How long have you been in that business?

A. Well, in California since 1920.

Q. And prior to that time?

A. I did appraising in Western Kentucky and Southeast Missouri in 1916, mostly for the New York Life Insurance on farm lands. [2]

Q. Have you been connected with any interests in this state?

A. Yes, I was an appraiser and on the loan committee for the Federal Land Bank in 1933 and 1934.

Q. That was in what portion of California?

A. Well, Ventura, Los Angeles and Orange Counties. I did not do any land bank appraising in this county at that time.

Q. Have you held any other positions relative to appraising?

A. In 1925 I began with the Farm Security Administration Supervisor of this county in which I had charge of the tenant purchase, and in San Bernardino County I think there was about 10 or 12 farms bought over in

(Testimony of Charles Aubrey)

Chino Valley, and then after resigning from that position a couple of years ago I have appraised about—well, more than 30 cases in this county for this court.

Q. Have you ever appeared as appraiser before the Federal Court?

A. Yes, a great many times.

Q. Have you appeared before any other courts as appraiser?

A. I don't think any other Federal court. I was on the Drainage District in Orange County. That case was heard before Judge Yankwich, and the Santa Ana Gardens Tract—I think that was Judge Stephens at that time.

Q. When you speak of your connection with the farms [3] Security Administration, was that for San Bernardino County only, or did it also include Riverside?

A. I worked in three counties, but I was really Supervisor for San Bernardino County. I also worked for—I worked up north on appraisals in San Joaquin County and also Visalia in some cases.

Q. Has your appraisals dealt with citrus properties?

A. Yes. The majority of them have been citrus.

Q. What is your present occupation?

A. Real estate and appraising.

Q. Are you familiar with the property which, for the purpose of this case we will describe as Wumkes Grove?

A. Yes, sir.

Q. How large a grove is that?

A. Well, it is assessed as 5.78 acres.

Q. Do you know whether it is improved or not?

A. Improved with orange trees; no buildings.

Q. It has no buildings on it? A. No.

(Testimony of Charles Aubrey)

Q. What is the nature of the trees that are on it? You say they are orange trees? A. Yes.

Q. Do you know approximately how many trees?

A. Yes, according to my count, I have made a count there of 798 trees total.

Q. Can you tell us how those trees are divided as to kinds and ages?

A. Well, in the back of the grove, which would be the south side, there are [4] about 95 Valencia trees which look to be about 8 or 10 years old, but I have understood they are nearly twice that age. Then there is 399 large older Valencia trees and 304 Navel trees, but 5 of those 304 are grapefruit, and I think there is a seedling or two there, too.

Q. These 399 old Valencia trees, are they up toward the front of the grove? A. Yes.

Q. This property is in the City of Redlands, is it?

A. Yes, sir, in the city limits.

Q. Did you examine the soil on that particular grove?

A. I examined the soil back in January, 1943. I dug some holes in the soil.

Q. That was prior to your former testimony in this court, was it? A. Yes.

Q. You testified here in this court before on this matter? A. Yes, sir.

Q. Now, what did you find the nature of the soil to be?

A. Well, about half of the piece of land there is very gravelly and sandy sub-soil. In fact, in places it is very gravelly from the top clear down, which would indicate, and also according to the government soil map survey, that there has been a wash through there.

(Testimony of Charles Aubrey)

Q. Can you tell us approximately where that wash goes through, whether at the rear or the front of [5] the grove? A. At the rear.

Q. Is that where these 95 young Valencia trees are that you speak of? A. Yes, sir.

Q. Can you tell us anything about the manner or the way that these trees are planted or set out on the property?

A. Well, for the acreage in my opinion they are entirely too close. They are less than 20 feet apart. Where the trees have grown to any size they are mingled together a great deal and very hard to cultivate and I think it has been proven that trees can be too close together after they get certain sizes.

Q. Is there some standard of number of trees to the acre that you go by in determining this fact?

A. Yes, sir. I think trees should, in my opinion, should be at least around 24 feet apart and I have known of them being 30 feet at the San Joaquin Fruit Ranch in Orange County. That is a part of the Irvine Ranch.

Q. How many trees are usually, in good practice, planted to the acre on a citrus property?

A. I think the average distance is about 24 feet.

Q. Well, then, would you want to say at this time how many trees would ordinarily be in approximately 6 acres?

A. Well, there should not be more than around 500 trees. [6]

Q. And on this property there are approximately 798 trees, is that correct? A. Yes, sir.

(Testimony of Charles Aubrey)

Q. Would the setting of those trees have any effect upon the grove at all?

A. I don't quite understand your question.

Q. The fact that they were set so close, what effect would that have upon the grove?

A. Well, about the same effect as if you planted corn too close; it would require, naturally, more fertilizer and more care, the closer they are. More feed, in other words, for the land, and even at that it is hard—when they are crowded I think it is—it is also another effect there of being crowded.

Q. Can you explain to us the fact that they are crowded, what effect that has on their bearing qualities?

A. Well, the main object in being so close together, it is just—where it is thin soil, it is just almost impossible to get enough fertilizer into the soil to make the trees respond as they should. That has been my experience. Practically the same thing if a row of corn is planted about twice too thick. It will grow stalk but it does not bear.

Q. What would you say would be the best use that this property could be put to? What is it best adapted for?

A. Oh, I don't think there is any [7] question but what it is best adapted to citrus in that vicinity. It would be good vegetable land, especially the front side.

Q. Did you check into the amount of water that is available to the property?

A. Well, I don't know if I made any—it has four shares of Lugo Water Company, which, in my opinion, is adequate water.

(Testimony of Charles Aubrey)

Q. You say that is adequate?

A. I think so, yes, sir.

Q. After looking over the grove and considering all of these facts, did you come to any conclusion as to what the reasonable value of that property is at the present time? A. Yes, sir.

Q. What is your conclusion?

A. Well, I think it is worth $5200 with the crop. As of January 28th, 1943, I estimated it at $3900, and I think the actual increase in value will amount to a third higher than it was at that time. However, I would not say that the grove was worth a dime more. If I was appraising it for a 20 year amortized Land Bank loan I would reject it. It probably would qualify for a Commissioner loan, but not a Land Bank loan.

Mr. Griffin: Cross examine.

Cross-Examination

By Mr. Nichols: Q. I notice you keep referring to the comparison of this property with a [8] row of corn. Has most of your actual farming experience been with raising corn in the Middle West?

A. No, sir. I have raised some corn. I have farmed about and saw to farming about the first 30 years of my life.

Q. Have you ever owned a citrus grove?

A. Yes, sir, several of them.

Q. Where were they located?

A. The closest one to this vicinity was in the canyon back of Smiley Heights over in this County, 23 acres.

(Testimony of Charles Aubrey)

Q. Did you participate in the farming or taking care of that property?

A. Well, I had it done. I did the irrigating myself.

Q. Do you own any orange groves now?

A. No, sir.

Q. How long had you owned an orange grove?

A. I owned that grove 3 or 4 years until I saw it was a marginal producer.

Q. You say you went over this property yesterday?

A. Yes, sir.

Q. Did you notice any change in the property yesterday as compared to January, 1943?

A. Yes, it appeared to me that the trees are in a little better physical condition. He has obviously been taking care of it.

Q. So that the property now is in better condition than it was when you looked at it in January, 1943? [9]

A. I would say slightly, yes.

Q. What—would you say there has been any change in the demand for orange properties between January, 1943, and today?

A. Yes, sir, that is why I have added one third on it since then. That, together with the care that it has had.

Q. What factors actually caused you to increase the value of the property at the present time?

A. Because groves are actually selling some higher and because of the grove being in a little better physical condition.

Q. And were those the only elements that entered into your change in fixing the reasonable value of the property?

A. No, not the only elements that I would have in fixing the value of the property.

(Testimony of Charles Aubrey)

Q. I am referring to the change.

A. Yes, that would be the primary reason.

Q. Were there any other elements that entered into your change in the value today as compared with what your valuation was in January, 1943?

A. I think that would be my answer; yes, that is the reason.

Q. When you examined the property in 1943 in January it had a crop on it at that time, did it not?

A. Yes, sir.

Q. And did it have both the Navel and Valencia crop on it at that time?

A. I remember the crop [10] being very slight. I am not sure—I don't think I made any notes as to the crop that year only as to it being a very slight crop.

Q. You examined the property again yesterday and what did you observe with respect to the crop or oranges on the property?

A. The crop was much better.

Q. Did you form any opinion as to the number of boxes there were on the trees at this time?

A. No. I was not appraising necessarily for an estimate on the crop.

Q. Would that appraisal be affected in any way by the crop that was on the trees?

A. I don't think it would. Over a period of years that you investigate the crop production, the past 15 years, you will find, some years, very good crops, and the most of them very poor.

Q. In other words, the appraisal you made of this property was based on an appraisal over a period of

(Testimony of Charles Aubrey)

years and not on the actual cash value, or market value of the grove today? A. On both.

Q. If there was a $3500 crop on the trees would that affect your appraisal of the property as you saw it yesterday?

A. I don't know that it would very materially because of the additional price now. I think I would average that with a period of years if I was going to appraise it for its fair worth today. [11] I think I would average that.

Q. In other words, when you appraised this property you considered it as a grove that would pay out over a period of years and on a basis of $5200 you figured the grove would pay out over a period of years, is that correct?

A. Yes, it should be able to pay out at that.

Q. The price of $5200, or the valuation of $5200 that you place on this property did not in any way consider the crop that was on the trees?

A. Only an average crop is the only way I would consider it over a period of at least 10 years.

Q. Did you look up the production record of the property?

A. I saw the record and I also saw the record back when Charlie Brown owned it many years ago and it has not averaged 300 boxes per acre, and that is what we call a marginal producer.

Q. During the last 5 years have you seen the production record of this grove? A. Yes, sir.

(Testimony of Charles Aubrey)

Q. What has been the average during the past 5 years?

A. I did not make any figures on that, but I did average it out. I know I averaged it back in 1943 and it was less than 300 boxes per acre.

Q. How far back did you average it?

A. At that time I think I went back 5 or 6 years.

Q. And you took into consideration the 1942-1943 [12] crop, did you? A. No.

Q. It was back of 1943? A. Yes.

Q. Now, are you familiar with any sales in the general locality within the past 6 months?

A. There was one place sold directly on the east side of this property before I appraised it in 1943 for $2100, a 5-acre piece sold to Mr. Hinkle, according to what he told me.

Q. That was before 1943?

A. That must have been in 1943.

Q. Within the last 6 months have you made any inquiry in the general locality of the Wumkes Grove as to any sales?

A. Yes, I have made some inquiry.

Q. Did you learn of any sales in the locality within a radius of 2 miles of the Wumkes Grove?

A. No. I don't know it straight but I heard—

Q. I want to know what sales you have known of.

A. I just understood that Mr. Hinkle sold this grove.

Q. This grove that he bought for $2100 he sold sometime in 1943?

A. No, I think he sold it in this year.

(Testimony of Charles Aubrey)

Q. 1944? A. I think he did.

Q. Do you know what he sold it for?

A. Somewhere around $4500.

Q. So that, in that particular case, Mr. Hinkle bought that grove for $2100 sometime either during [13] the early part of 1943 or in 1942 and sold it in 1944 for more than twice as much as he paid for it? Is that correct?

A. Yes, he possibly did.

Q. In your opinion has the demand and the market value of groves increased in accordance with the purchase by Mr. Hinkle and the sale of his property?

Mr. Griffin: Cannot we have one question there?

Mr. Nichols: I will reframe it.

By Mr. Nichols: Q. Mr. Hinkle purchased the grove for $2100 and within a period of approximately a year sold it for $4500. Is that correct?

A. That is what I understand.

Q. In your opinion, does that increase represent an increased demand for properties of this general nature?

A. No, sir.

Q. Then what do you attribute the increased sale to?

A. I think just like many of these sales, I think he bought it a little bit cheap.

Q. Did you ever see the property? A. Yes, sir.

Q. Where was it located with respect to the Wumkes property?

A. It joins this within a 5-acre piece.

Q. Do you know what the production record was on the Hinkle grove? A. No, sir.

Q. You say it has how many acres approximately? [14] A. Approximately 5 acres.

(Testimony of Charles Aubrey)

Q. Now, you have fixed what you consider a reasonable value on this property. Would you fix the market value of this property at any different figure, the present market value of the property as of today?

A. Which property?

Q. The Wumkes property?

A. No, I think this is a fair market value.

Q. Do you know of any offers that have been made to purchase this property? A. No, sir.

Q. Would it affect your appraisal and your fixing a reasonable value if you knew an offer of $10,000 was made for the property?

A. Not a bit in the world, on this market. I would not be at all surprised to hear of that being offered, but that is no sign I think it is worth it.

Q. Do you know what market value is? In your opinion what is market value?

A. Well, it is in case a seller desires to sell but does not have to sell and the buyer likewise, that he does not have to buy but will buy.

Q. Would you fix the market value at any different figure than the reasonable value?

A. No, I think I would state that the reasonable value.

Q. When you say "reasonable value" you mean the same thing as market value?

A. Together with it, [15] naturally.

Q. There isn't any difference between your statement of reasonable value and your statement of market value?

Mr. Griffin: Objected to as argumentative. The witness has already testified that when he said market value or fair or reasonable value he meant the same.

(Testimony of Charles Aubrey)

By Mr. Nichols: Q. Is that what you understand it is, the same? A. That is right.

Q. You are familiar with the Lugo Water Company stock of this property?

A. I am not so familiar with that particular stock, but I have had to figure out water costs on many similar wells all over the country in Land Bank appraising.

Q. When you say that four shares of Lugo Water stock are adequate for this property, what water does that furnish to the property?

A. Well, it furnishes about 2 acre feet.

Q. That is the four shares will furnish 2 acre feet?

A. Yes, probably more; I haven't figured it out carefully, not to the fraction of an inch, but I just say nothing else but what the water is adequate.

Q. So, to sum up your testimony, if I understand it correctly, the fact that there may have been cash offers for the property considerably in excess of the [16] amount that you have fixed as a reasonable value of this property, that still would not change your estimate of the reasonable or market value of the property?

Mr. Griffin: Objected to as already asked and answered.

Mr. Nichols: This is cross examination.

Mr. Duffy: If he has already answered it let him answer it again.

A. I think I know exactly what I said. It would have no bearing upon my judgment.

Mr. Nichols: That is all.

(Testimony of Charles Aubrey)

Redirect Examination

By Mr. Griffin: Q. Offers to purchase, if made, always involve certain conditions, do they not?

A. Yes, sir.

Q. And you have to take various conditions into consideration? A. Yes, sir.

Mr. Griffin: That is all.

Recross-Examination

By Mr. Nichols: Q. What conditions would be involved in a cash offer?

A. Well, do you mean with reference to the locations?

Q. I don't know what you mean by "offers to purchase involve certain conditions." Will you tell me what conditions offers to purchase involve? [17]

A. Well, location and the soil condition and climatic condition and many things can enter into it. It could be close to another farm that one would want to purchase for some good reason and it would be worth more to one party than another.

Q. Assuming that you had a cash offer to purchase property, what conditions would be involved?

A. Well, the one you would naturally consider would be the most money offered if you were the seller.

Q. And, if the amount of money was adequate that would be the full condition, would it not?

A. Naturally.

Mr. Nichols: That is all.

Mr. Griffin: That is all.

J. W. MEHL,

called as a witness by the debtor, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Griffin: Q. What is your name?

A. J. W. Mehl.

Q. Where do you reside? A. Upland.

Q. How long have you resided there?

A. 30 some odd years.

Q. What is your business or occupation?

A. Inheritance Tax Appraiser. [18]

Q. How long have you held that position?

A. Since 1931.

Q. In what county is that?

A. San Bernardino.

Q. What was your occupation prior to that time?

A. Hardware business.

Q. Are you familiar with the citrus industry?

A. I am.

Q. In the course of your duties as Inheritance Tax Appraiser has it become necessary for you to appraise all kinds of property in the County of San Bernardino?

A. That is right.

Q. Have you had occasion to appraise a considerable amount of citrus property? A. I have.

Q. Have you looked over the property that is involved in this appraisal that we will call here the Wumkes grove?

A. I have.

Q. That is located in Redlands, is it?

A. Yes, sir.

Q. Is that citrus property? A. It is.

(Testimony of J. W. Mehl)

Q. What can you tell us about the nature of the property in general?

A. Well, I was over there several times and went over it and I figured there was 42 rows deep and 19 rows wide, a total of around 800 trees, approximately 6 acres, and the back part of the grove there is Valencias in front and Valencias clear at the back, and the rest of them are Navels. [19] The trees in the back seem to be planted —I don't know—it is gravelly soil, sandy, looks like a wash had been filled in sometime. I don't know, but it has that appearance. The trees in front are large trees, but very close together. They are tall and the crop on them for the size of the trees is just about a half a crop. The reason is, I figure, on account of the sun not getting into it because most of the crop is in the top of the trees and the trees will never bear a big crop.

Q. You say they never will bear a big crop?

A. Not the way they are set.

Q. Why is that?

A. They are too close together. The trees are large and the only way they can let the sun into the tree is pruning the top of the tree. They will never produce a big crop but a tree that size should produce about 6 boxes to the tree, so I estimated just about half of 6 boxes to the tree.

Q. Does the closeness of the trees have anything to do with the availability to cultivate?

A. It naturally would.

(Testimony of J. W. Mehl)

Q. In what way would it affect that? Suppose you are pruning the top of the tree?

A. Well, your tree is just growing out of sight. You can only go about so high on a citrus tree. All citrus trees are pruned from the top and bottom both. You have got [20] to leave light in it and you have got to get the sun in it.

Q. And you would have to make a general pruning all around in order to get the light in there?

A. Yes, but these trees are so large and close together that a person cannot get to them.

Q. That is not true of the smaller trees at the rear?

A. No, they look more as if they were stunted.

Q. Did you notice the soil over there at all?

A. Yes.

Q. I think you spoke of it as being gravelly.

A. Yes, gravelly and sandy. At the back it is very gravelly.

Q. Did you come to some conclusion as to the reasonable market value of that property at the present time?

A. I did.

Q. What is your opinion at this time as to its reasonable market value?

A. Well, without the crop I would estimate it at $4450, and for the crop 1500 boxes. The ceiling price is four cents a pound, 50 pound field boxes would be $3000 for the crop on the trees, and that would be $7450 with the crop, but to figure that net to the grower generally figures about 75 cents a field box net to the grower, so the packing house men tell me. So, taking those figures, $4450 and $1125 would be $5575 net to the [21] grower if he takes out his labor.

Mr. Griffin: You may cross examine.

(Testimony of J. W. Mehl)

Cross-Examination

By Mr. Nichols: Q. When was the last time you were on the property? A. Last week.

Q. When was the first time you were on the property?

A. The week before.

Q. You never saw the property the early part of 1943? A. No.

Q. You don't know what change there may have been in the property? A. No.

Q. Do you know what the Navel crop was on a box basis?

A. No, I don't. I saw a report on that. I forget just what. It was very low.

Q. Mr. Duffy, do you have the returns from the Navel crop?

Mr. Duffy: I don't know.

By Mr. Nichols: Q. Now, you estimate there were 1500 boxes of Valencias on the property?

A. Roughly, yes.

Q. Now, we find today that there is 1159 boxes of Navels that were picked off that grove. Did you ever make a check on the number of trees that were on there?

A. Yes, there were approximately 800 trees; 798, I think.

Q. How many were Valencias?

A. Approximately [22] 500 Valencias.

Q. Then approximately 300 Navels? A. Yes.

Q. And you estimate that there is 1500 boxes of Valencias on the property?

A. That is what I would say, roughly.

Q. Have you ever owned an orange grove yourself?

A. No.

(Testimony of J. W. Mehl)

Q. You have been in the hardware business before you became Inheritance Tax Appraiser?

A. That is right.

Q. What is the basis upon which the Inheritance Tax Appraiser appraised property? Is it on a basis of market value? A. That is right.

Q. What would you say would be a description of what market value is?

A. Well, if you had a ready buyer and a ready seller.

Q. What is your understanding of what market value is?

A. If you had a ready buyer and a ready seller.

Q. That would be a criterion for market value?

A. That is right.

Q. If there was a ready buyer for this property for $10,000 cash would that affect your appraisal, if you knew that that offer was being made?

A. I think the man would be crazy.

Q. Would it affect your appraisal of the property?

[23] A. No.

Q. It would not make any difference so far as your appraisal was concerned?

A. No, I think it would be out of line.

Q. In the event you knew that there were three offers to purchase by various purchasers on a cash basis between $9,000 and $10,000 for this property, would that affect your appraisal?

A. Naturally it would.

Q. So that when you appraise property you take into consideration the demand for property in that locality?

A. Yes, sir.

(Testimony of J. W. Mehl)

Q. In appraising this property did you inquire as to whether there had been any sales in that locality?

A. I did not.

Q. Now, did you take into consideration that there had been 1159 boxes of Navels picked on the property, which would make them a total picked on the property of a known amount of 1159 boxes and an estimated amount of 1500 boxes?

A. No, because the Navels were gone.

Q. Now, take this one piece of property, this same piece of property after the Valencias are off.

A. I would appraise it at a different figure.

Q. You mean when the Valencias are off the property then you would appraise it at a different figure? [24]

A. Sure.

Q. What would you appraise this property for when the Valencias are off?

A. I would appraise it at $4450.

Q. And your appraisal with the Valencias on is what?

A. $7450, but that would not be net to the grower.

Q. Will you tell me what your appraisal is with the Valencia crop on? A. $7450.

Q. Now, this is approximately 6 acres?

A. Approximately.

Q. Assuming that there are 2659 boxes of both Valencias and Navals from the property what would you say the estimated return would be from that fruit?

(Testimony of J. W. Mehl)

A. That is hard to tell because they are different seasons. The Navel season is not the same as your Valencia season. When the Navels are ready to be harvested the Valencia crop has just barely started.

Q. Do you know whether Navels generally brought the ceiling price this year?

A. I think they did.

Q. Well, assuming that they brought the ceiling, and assuming that the Valencias will bring the ceiling—

A. I forget what the ceiling was, but it is changed, I understand.

Q. Then, just assuming that the crop on this property brought $5,000 gross returns or net returns from the packing house, would that in any way affect [25] your appraisal?

Mr. Griffin: I object to that on the ground it is incompetent, irrelevant and immaterial and also asking two questions. I think if the question is read back it shows gross returns and net returns.

By Mr. Nichols: Q. Assuming that the fruit on this —the packing house net returns on this property brought in the neighborhood of $5,000 this year, that is, the 1943-1944 season, would that affect your appraisal?

Mr. Griffin: Objected to as incompetent, irrelevant and immaterial and asking for a conclusion of this witness as to what are the net returns. Is there anything taken out for pruning or fertilizing or upkeep?

(Testimony of J. W. Mehl)

Mr. Nichols: I am not bringing that into the question. I say the net packing house returns.

Mr. Duffy: You are assuming that certain things are done?

Mr. Nichols: That is right.

Mr. Duffy: Then you are asking him to fix the value on an assumption as to what might be the return.

Mr. Nichols: No, it is a hypothetical question if the net returns received from the packing house were $5,000 on this property would that affect [26] or have any effect upon Mr. Mehl's appraisal of this property?

Mr. Griffin: I object to it as no proper foundation laid.

Mr. Duffy: I think that will have to be sustained.

By Mr. Nichols: Q. Now, you say that you have never operated an orange grove? A. No.

Q. And you don't know what the actual cost of production is to a grower of your own knowledge?

A. Only what I got from packing house managers. I meet quite a few of them.

Q. But that has not been from actual experience?

A. No.

Q. Did you make any inquiry from any property owners in this general locality as to what they were holding their property for? A. No, I did not.

Q. You made no inquiry as to any sales that may have occurred in the territory? A. No.

(Testimony of J. W. Mehl)

By Mr. Duffy: Q. What is the figure now that this court has got to deal with?

A. I have given $4450 without the crop; an estimated crop of $3,000, but a net to the grower of $1125.

Mr. Duffy: Then your value for the property—

A. Without the crop would be $4450.

Mr. Duffy: And $1125 for the crop? [27]

A. Yes, net to the grower, that is $5575.

By Mr. Nichols: Q. How did you arrive at that net figure that you give?

A. I get that from packing house men, that it should bring net to the grower 75 cents a field box.

Q. I assume you have based that figure on a ceiling price on Valencias? A. That is right.

Q. And that is $2.00 is it?

A. Yes, 4 cents a pound, I think it is.

Q. Do you know what size box the packing house has? A. 50 pounds a box.

Q. What would that ceiling be?

A. $2.00 for a field box, so I understand.

Q. Then you figure it costs the grower $1.25 per box to raise that fruit? A. That is right.

Q. On a basis of obtaining a ceiling then, a deduction of $1.25 per field box for growing, that would leave 75 cents net to the grower? A. Right.

Mr. Nichols: That is all.

Mr. Griffin: That is all.

W. H. JOHNSON,

called as a witness by the debtor, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Griffin: Q. State your name. [28]

A. W. H. Johnson.

Q. What is your business or occupation?

A. Real estate broker.

Q. Where are you situated? A. Redlands.

Q. How long have you been in business in that city?

A. About 24 years, or 23.

Q. What kind of business was that?

A. Real estate business.

Q. And have you been connected with any companies or anything along that line?

A. Yes, I was with the Redlands-Yucaipa Land Company before I went into business.

Q. What is the nature of that business?

A. Developing deciduous land, subdivisions.

Q. Has your business caused you to become familiar with citrus properties? A. Yes, sir.

Q. And is that in the nature of buying and selling citrus properties or in the nature of owning?

A. Buying and selling.

Q. Have you ever owned or operated citrus properties?

A. Not citrus. I have operated deciduous orchards for the last 30 years.

Q. Are you familiar with the operation of citrus properties? A. Yes, sir.

Q. Have you ever acted as an appraiser before?

A. Yes, sir. [29]

(Testimony of W. H. Johnson)

Q. In what courts?

A. Oh, a number of appraisals in this court and also in the Superior Court.

Q. Now, are you familiar with this property that we have called the Wumkes property? A. Yes, sir.

Q. You testified in the former hearing, didn't you?

A. Yes, sir.

Q. Have you examined the Wumkes property?

A. Yes, sir.

Q. And did you prepare for the other hearing a plat not only covering the Wumkes grove but also covering the Clark grove? A. Yes.

Q. The Clark grove is an adjoining grove?

A. That is right, to the east.

Q. I will ask you if this is the plat that you have prepared? A. Yes, sir.

Q. Just what does this represent, Mr. Johnson?

A. That represents the planting of the grove and the varieties of trees.

Q. And do you designate on there the type of trees in some kind of a tabulation? A. Yes, sir.

Q. And you prepared this tabulation yourself, did you? A. Yes, sir.

Mr. Griffin: I offer this in evidence at this time.

Mr. Nichols: No objection.

Mr. Duffy: Debtor's Exhibit 4 admitted in [30] evidence at the last hearing on this proceeding, to-wit, on the 3rd day of March, 1943, and now being filed in the office of the Clerk of the United States District Court, Southern District of California, Central Division, is now admitted as an exhibit in this hearing as "Debtor's Exhibit 4."

Trumpkie Grove — Lugonia Avenue

House — Yard — Chicken House

Key

V. N	Young trees
NI	Small but older trees
(N)	Vacant Space or diseased worthless trees.
(NI)	Small stunted worthless trees. Should come out
-	Australian trees – 20 of them.
B	Blood oranges.
S	Seedlings.
Sw	Sweets.

Dilltop Ex 4 for Investigators Admitted

(Testimony of W. H. Johnson)

Mr. Nichols: I have no objection to its being admitted in this hearing with the understanding that it is admitted as a chart which was made on the day that Mr. Johnson will testify that it was made.

Mr. Griffin: No objection to that.

By Mr. Griffin: Q. Since the time that you made this plat, have you been upon the property?

A. Yes, sir.

Q. Do you know whether there have been any changes made on the property that you have not indicated on the plat?

A. Not that I know of. Possibly a few new trees may have been put in. I did not check that definitely.

Q. Now, calling your attention to this plat, I notice a key over here. Just explain this key to the court.

A. Well, the youngest tree in the grove, the smaller ones, these underlined, both the Valencias and Navels.

Q. In other words, the tree that is a young Valencia tree is designated by a "V" with a red line underneath it? A. That is right. [31]

Q. And a young naval tree would be with an "N" with a line underneath it? A. That is correct.

Q. Now, what is the key that you use for small but older trees?

A. Well, there is an effort to segregate the two different sizes of trees. They run from larger trees in the front to very small ones in the back. This is a small but older tree than the ones that are underlined.

Q. That is small but older trees you have designated by a "N" with a red line going perpendicular to that to the right, is that right? A. That is right.

(Testimony of W. H. Johnson)

Q. Then the vacant space of worthless trees, you have an "N" with a circle around it?

A. Well, the circle indicates a vacant tree. Practically all of them are Navels.

Q. If it was a Valencia it would be a "V" with a circle in red? A. Yes, sir.

Q. Then the other small stunted worthless trees which you say should come out are indicated by an "N" or a "V" with a box in red around it, is that right?

A. Yes.

Q. Now, the last part of your key does not apply to the Wumkes grove?

A. No, this is over in the other grove.

Q. Directing your attention to your plat here I note that the front portion of the grove is marked [32] pretty well with "V's." What is the nature of that property to the front of the Wumkes grove?

A. Those are the larger Valencia trees. They are large and very close together.

Q. And then in behind I notice that you have a number of rows of "N" or Navel trees. Is that correct?

A. That is the block of Navels in back of the Valencias, yes, sir.

Q. And then immediately following the Navel trees and at the rear of the grove I find some 5 rows of Valencies. Is that correct? A. That is right.

Q. And those Valencias in the rear are marked "V" with a line underneath them? A. Yes.

Q. What do you mean by that?

A. That they are the younger trees, and the smallest trees in the plat.

(Testimony of W. H. Johnson)

Q. Now, Mr. Johnson, can you tell us anything regarding the nature of the soil of this grove? Did you examine it? A. Yes, sir.

Q. What did you find?

A. I found that the soil in the rear is very very light gravelly soil and it gets heavier as you go to the north or front side of the grove. The rear of this grove and the adjoining groves, the trees never have been able to accomplish anything and my inquiry from the Pioneer neighbors is that there was a wash a number of years ago that [33] went through that back section.

Q. Now, what is the nature of the trees in that back section?

A. Well, they are small and they are stunted trees. They look like about 8 to 10 year old trees and apparently they are nearly 16, is the information I got from people that knew when they were planted.

Q. Now, did you take some pictures out there of the grove? A. Yes, sir.

Q. These pictures that you took are the ones that were taken for the former hearing?

A. Yes, just a few days before the former hearing.

Q. And that was approximately a year ago?

A. Yes, a little over a year ago.

Q. I show you this picture and ask you if you remember what that was.

A. This was taken in the rear of the Wumkes grove.

Q. Is that the small trees that you speak of back there? A. Yes.

(Testimony of W. H. Johnson)

Mr. Griffin: I offer this in evidence.

Mr. Nichols: I object to it on the ground that it does not clearly represent the condition of the trees at the present time. The testimony is it was taken over a year ago.

By Mr. Griffin: Q. You say you were in the property just recently? A. Just last week, yes. [34]

Q. And you know the condition of the trees in the rear of that grove at the present time, do you?

A. Yes, sir.

Q. Would you say there was any material difference in the appearance of the grove at the present time to what it was when that picture was taken?

A. Very little, any more than the natural 12 months would give it.

Q. Would you say that picture there has materially changed since the picture was taken? A. No.

Mr. Griffin: We renew the offer.

Mr. Nichols: We object to it and on the additional ground that no proper foundation has been laid and the statement of the witness that there has been a change.

Mr. Duffy: Well, I think that is a matter for cross examination. Objection overruled. The exhibit is a file of the United States Court and is marked "Debtor's Exhibit 9."

DEBTOR'S EXHIBIT 9.

(Testimony of W. H. Johnson)

By Mr. Griffin: Q. I show you another picture and ask you what that purports to be?

A. That is another picture in the rear of this same orchard.

Q. And when was that taken?

A. I think it was in February, 1943.

Q. And it was taken for the purpose of showing the [35] size of the fruit?

A. The size of the fruit and it was a 14 foot pole there.

Q. You have been in the grove recently, have you?

A. Yes, sir.

Q. Would you say that the height of those trees have materially changed since the taking of that picture?

A. No, they have not.

Mr. Griffin: I offer that in evidence.

Mr. Nichols: Object to it.

Mr. Duffy: Overruled. Admitted as "Debtor's Exhibit 8."

DEBTOR'S EXHIBIT 8.

(Testimony of W. H. Johnson)

Mr. Nichols: I want my objection to show the grounds that no foundation has been laid and that the pictures were taken too long ago to correctly represent what the present condition of the property is.

Mr. Duffy: The same ruling.

Mr. Griffin: I show you this picture and ask you what that indicates?

A. That shows the same pole alongside of one of the largest trees in the upper end about in the center here. At the time that was taken there was not a dozen oranges on that tree.

Mr. Nichols: I object to the answer and move to strike it out on the ground it has no bearing on this case as to what oranges were on the trees [36] in 1943.

Mr. Duffy: That portion of the answer as to the number of oranges on the trees will be stricken out.

By Mr. Griffin: Q. The picture was taken, was it, for the purpose of portraying the height of the tree?

A. Both the height of the tree and the bearing condition of the trees is that section there.

Q. Where is that portion of the grove located? Is that to the front or the rear? A. To the front.

Q. The trees to the front are larger or smaller than the trees to the rear? A. Very much larger.

Q. From your examination of the grove and your experience as an appraiser, did you come to a conclusion as to the reasonable market value of this property at the present time? A. Yes, sir.

Q. And what was your opinion as to the reasonable market value at this time?

A. I appraised it at $5400.

(Testimony of W. H. Johnson)

Cross-Examination

By Mr. Nichols: Q. This plat that you made, Mr. Johnson, was made sometime about in January or February of last year?

A. Yes, sir, I think it was in February.

Q. Do you recall how many trees there were on that [37] property?

A. I think it was just a few trees less than 800.

Q. How many of those trees were so-called stunted trees?

A. I don't know. This entire section back here—probably a little less than half.

Q. You mean a little less than half of the entire trees on the property were stunted trees? A. Yes, sir.

Q. And were those Navels or Valencies or both?

A. Navels and the smaller Valencias in the back.

Q. Now, you have placed the reasonable market value of this property at this time as $5400?

A. That is right.

Q. And that is the way the property stands today?

A. Yes, sir.

Q. That is with the crop on the tree, is it?

A. Yes, sir.

Q. And did you also make an estimate as to the number of boxes of Valencia oranges on the trees at this time?

A. Yes, there is probably from 1200 to 1500 boxes in there.

Q. When did you make that estimate?

A. This past week.

(Testimony of W. H. Johnson)

Q. How did you make it?

A. I went through the grove and sized up the trees, about what they would be per tree. [38]

Q. Did you actually go through the grove and size up the trees as to what fruit they had on them?

A. Yes, sir. I don't claim to be a fruit man and am not in the estimating business, but I think I am pretty close to it.

Q. You haven't done such an awful lot of it, have you? A. No.

Q. Have you sold any citrus property in this general locality in the past 6 months? A. No.

Q. Have you had any listed for sale?

A. No, not right in there, no.

Q. How near would you say the nearest grove that you had listed for sale was with respect to this property?

A. Oh, probably a mile and a half or 2 miles from there.

Q. What property was that?

A. The property east of this grove on Lugonia Avenue, just past Orange Street.

Q. Just how many acres are there in that piece?

A. 5 acres.

Q. What was it listed with you at?

A. I sold it for $5500.

Q. How long ago was it that you sold it?

A. Oh, it has been probably very nearly a year, 10 or 12 months.

(Testimony of W. H. Johnson)

Q. Between the time you sold this property that you [39] have testified to and the present time, has there been any increase in the demand for citrus land?

A. I think there has been a gradual increase in citrus land during the past couple of years.

Q. And the grove that you say you sold over a year ago for $5500, do you have any opinion as to what you could sell that grove for today?

A. Well, I don't believe it would sell for any more today.

Q. Was that Navel or Valencia?

A. Well, some Navel and some Valencia, quite a few sweets and a few seeds.

Q. Was the property improved with a house?

A. No house, no.

Q. And was it sold at the time when there was fruit on the trees? A. Yes.

Q. What kind of a set of fruit did it have, if you recall?

A. Well, it was not a large crop; probably not over 1500 boxes on it.

Q. In your opinion how did that property, with respect to the trees, compare with the Wumkes property?

A. Well, it is in much better soil, stronger soil. I had seven shares of Old Lugonia water, which has a market value of $225 a share.

Q. Do you know what the market value is of Lugo water stock? A. No, I don't, exactly.

Q. You haven't heard of any offers of sales that [40] have been made recently?

A. No, it is an old established well; there is none particularly for sale that I know of.

(Testimony of W. H. Johnson)

Q. In your opinion what is the reasonable market price for a share or for four shares of Lugo Water stock?

A. It would only be a guess. Well water generally does not bring the money that the Mutual Water Company shares bring.

Q. Did you take into consideration in your forming an opinion as to the reasonable market value the fact that there were four shares of Lugo Water stock that went with this property?

A. Naturally I took into consideration the nature of the water.

Q. What did you fix the value of that stock at then?

A. I did not break it down into small items. We know that well water is not, or does not, carry the value to the grove that water stock does.

Q. Do I understand that you did, or did not, place any value on this Lugo Water stock?

A. Naturally I did.

Q. You don't know what it is at this time?

A. No, I did not break it down.

Q. You testified before, did you? A. Yes, sir.

Q. What did you fix the reasonable value of this property at that time in the former hearing?

A. $3600. [41]

Q. And what has occurred since the prior hearing to make you change your figure at this time?

A. Well, there is a more active market and all properties are selling for more money than they have in the past. It has a little more fruit on it than it had before.

(Testimony of W. H. Johnson)

Q. Do you know of any citrus property in this general locality available for purchase for a thousand dollars an acre? A. No, I don't.

Q. Do you know of any available for purchase for $1500 an acre?

A. I haven't any listings in this vicinity at all at the present time.

Q. So that during the past year you have not been familiar with the value, at least the sale value, of property in this general locality?

A. Well, yes, I know what went on in that district.

Q. Were there any sales that you know of?

A. Yes, the adjoining property to Wumkes to the east sold.

Q. How many acres was that? A. 5 acres.

Q. What did that sell for? A. $4500.

Q. What piece was that?

A. The Hinkle grove.

Q. And that was sold more than a year ago?

A. Just about a year ago, I think. Well, it was not sold at the time we had this hearing here.

Q. Do you know of any other properties? [42]

A. 15 acres sold across the street from this grove.

Q. What did that sell for? A. $19,000.00.

Q. Do you know of any other property that was sold?

A. Yes, further west on Lugonia there was a 16 acre piece that was sold.

Q. How much was that sold for?

A. A friend of mine here can probably give us a better idea.

(Testimony of W. H. Johnson)

Q. Do you know? What is your best opinion as to what it was sold for?

A. My best opinion would be $8500. I had it listed for $7500.

Q. $8500? A. Yes, sir.

Q. That is located where?

A. That is west on Lugonia.

Q. Approximately how far west?

A. Oh, I don't know; a mile or two, probably a couple of miles.

Q. How did that property compare with the Wumkes property?

A. Well, the size of the trees are about the same; the grove has been neglected and the trees were full of dead wood.

Q. It was not what is called a good grove?

A. It had been a good grove and then tremendously neglected. I hope it will come back.

Q. How long ago was that sale made to your knowledge?

A. Oh, I should judge something like a year ago; I don't remember exactly.

Q. Have you evidenced any interest of any purchasers [43] or anybody seeking to purchase citrus properties in this general locality?

A. Well, there are available buyers for property in any location or grove that they are seeking might be available.

Q. Have you had any prospective buyers ask you for properties in this general locality recently?

A. Yes, Dr. Clark looked at the grove adjoining on the south of this property some little time ago and turned it down.

(Testimony of W. H. Johnson)

Q. What was the asking price for that property?

A. I don't know exactly; I think it is about 7 or 8 acres; it has a good house on it. I sold Dr. Clark his first grove when he came to Redlands and he was in my office and I asked him why he didn't buy this grove and he said—he spoke of the wash running through there and it was not the class of grove that he would be interested in.

Q. You don't know whether he made an offer or not?

A. He did not, no.

Q. You say there is a sandy gravelly condition in a part of this property? A. Yes, sir.

Q. Does that appear to have been caused by the wash? A. Yes.

Q. What did you find with respect to the existence of a wash on this property?

A. It goes through for some distance going from the northeasterly to a [44] southwesterly direction, draining the section to the east.

Q. Is that an open wash?

A. It is not at the present time, but it had been. The city has improved their drainage and a few years ago that was taken care of.

Q. So that as far as the future is concerned that hazard of a wash has been removed?

A. I think the water hazard has, yes.

Q. In your opinion the property would gradually, or the soil condition would gradually improve on this property?

A. Well, it would naturally improve as you use more fertilizer, but it is real gravelly in the back. There isn't any soil there.

(Testimony of W. H. Johnson)

Q. This property is in a good location, is it not, in a citrus field? A. Yes.

Mr. Nichols: That is all.

Redirect Examination

By Mr. Griffin: Q. This property that you were speaking of, this 15 acres that sold for $8500—

A. The 15 acres sold for $19,000.

Q. I was thinking of the one that was bought by Mr. K. C. O'Bryan, that piece I think you said you had it listed for $7500 and it sold for $8500.

A. As near as I know. It sold for more than I had it listed for at that time. [45]

Q. How many acres was there in that piece?

A. It is called 15 acres. In my opinion it is nearer 14.

Q. Is there a house on the property or not?

A. There is an old house.

Q. The house would be included in the value, is that correct? A. Yes.

Q. This grove across the street that you spoke of—what is the name of that grove?

A. A. R. Shultz owns it at the present time and bought it from Dr. Sweeney.

Q. How many acres are in that grove? A. 15.

Q. That sold for how much? A. $19,000.

Q. Was that with the crop or without the crop, do you know?

A. That was with the crop, at least part of the crop.

Q. Does that have any buildings on it?

A. Yes, there is a building, stucco, I believe.

Q. Are there any buildings on it?

A. No, I guess not.

(Testimony of W. H. Johnson)

Q. In comparison to the Wumkes grove is that a better grove or not as good a grove?

A. Yes, I think it is a much better grove. After all we buy orange groves for the production we can get and these are very large trees and I think it would be an average the last 10 years of 3 times the production of this [46] grove we have here.

Q. The Wumkes grove? A. Yes.

Mr. Griffin: That is all.

Recross-Examination

By Mr. Nichols: Q. Do you base your fixing a reasonable market value on the productivity of the property, on the returns from the property?

A. Yes, sir.

Mr. Nichols: That is all.

Redirect Examination

By Mr. Griffin: Q. Do you take in any other elements at all in arriving at that value?

A. Well, naturally I take into consideration a good deal of common sense in checking my groves. For illustration, I see 60 acres in the Highgrove district sell about 12 years ago for $120,000 and I saw it sell less than a year ago for $20,000. If a man is going to be an appraiser he is going to have to use a lot of horse sense in between to get the actual value of that grove. It certainly would not be worth $120,000, and the $20,000 would be ridiculous. This particular grove we are appraising today shows a production of from less than 2 boxes to a little over 3 boxes per tree over a period of probably 5 or 7 years. This present year is probably the

(Testimony of W. H. Johnson)

largest crop it has had in a number of years. We [47] concede that a grove owes itself at least 3 boxes of fruit per tree for maintenance and that certainly reflects a valuation over a term of years if you cannot get more fruit than enough to maintain it, and it is not a very hot investment. You cannot gauge the value of a grove on one year's production.

Q. Then, in order to determine the reasonable market value you take into consideration as an element of productivity of the grove, is that right? A. Yes, sir.

Q. And do you also take into consideration the demand for groves at the present time, or at that time?

A. Yes. We have what some call a gambler's market at the present time.

Q. Do you also take into consideration the soil and nature of the trees? A. Naturally.

Q. And the locality? A. Yes, sir.

Q. And in refering to the market you are taking into consideration the various sales that you have heard made in that district, isn't that correct? A. Yes.

Mr. Griffin: That is all.

By Mr. Nichols: Q. You stated that the production of this grove has been increased in the last year that you have been familiar with the property.

A. Yes, we have one of the largest [48] crops this last year over the entire district.

Q. And this particular property has been gradually built up from nothing to now something over 3 boxes?

A. That is the record.

(Testimony of W. H. Johnson)

Q. So that this property due to care or the conditions is improving greatly in value, is it not, as time goes on?

A. Well, the condition of the grove is a little better than it was a year ago.

Q. And was it a little better a year ago than it was 2 years ago?

A. Possibly to some extent. I didn't see it 2 years ago.

Mr. Nichols: That is all.

Redirect Examination

By Mr. Griffin: Q. Do you know what the crop was last year on the grove?

A. I brought the record in here but I don't recall it.

Q. Can you tell us roughly? A. I don't remember just what it was.

Q. I think that you testified that the crop—

Mr. Nichols: Are you going to refresh his memory or are you going to let him testify?

Mr. Griffin: Wait until I finish my question.

By Mr. Griffin: Q. I think you testified that in 1941-1942 the crop was somewhere a little better than 3 boxes to the tree. Is that correct? [49]

A. That is right.

Q. Do you have any idea as to what the crop was last year?

A. No, but it was a much lighter crop. It is in the record at the last hearing.

Mr. Griffin: That is all.

Mr. Nichols: That is all.

Thereupon a recess is taken until 1:30 o'clock P. M.

After recess. 1:30 o'clock P. M.

J. H. NICHOLSON,

called as a witness by the debtor, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Griffin: Q. Where do you live?

A. Redlands.

Q. How long have you lived there?

A. Since 1914.

Q. What is your business or occupation?

A. I am Assistant Secretary of the Redlands Heights Groves.

Q. How long have you held that position?

A. Since 1927.

Q. And is that a packing house? A. It is.

Q. What kind of a packing house? A. Citrus.

Q. Are you interested in citrus properties? [50]

A. Yes, sir, I am.

Q. As an owner or in what capacity?

A. As an owner.

Q. Are you familiar with the operation of groves?

A. I am.

Q. And you have been for what time?

A. Since 1925.

Q. Is there anything in your educational background pertaining to citrus trees or the care of citrus trees?

A. Well, in that connection my 2 years in ranching experience would answer that.

Q. I was thinking of your scholastic attainments.

A. No, entirely the opposite.

(Testimony of J. H. Nicholson)

Q. Are you familiar with the property we have been talking of here, referred to as the Wumkes grove?

A. Yes, I am.

Q. That grove has been operated by Mr. Powell for the last two years? A. That is correct.

Q. And the crops that have been picked and marketed have been marketed through the Redlands Heights Company? A. Yes.

Q. Are you also familiar with the grove itself?

A. I am.

Q. And have you ever—have you, by reason of your familiarity with the grove and also from your experience arrived at an opinion as to the market value of that property at the present time? [51]

A. I have, yes.

Q. What, in your opinion, is the market value at this time? A. $6,000.

Mr. Griffin: That is all.

Cross-Examination

By Mr. Nichols: Q. That is with or without the crops? A. As is.

Q. As it is now? A. Yes, sir.

Q. You have gone over this property recently, have you? A. Yes, sir.

Q. Have you made any estimate as to the crop that is on the property?

A. Approximately 1500 boxes, I would say.

Q. Would you say it would be more than that?

A. No, I would not. Our packing house estimated it originally at 1100.

Q. And then have they changed that estimate?

(Testimony of J. H. Nicholson)

A. I believe they have. They have revised their estimates upwards in most cases.

Q. You don't know what the later estimate is?

A. No.

Q. You say you own citrus property?

A. Yes, sir.

Q. And you own that property in this general locality?

A. Within two and a half or three miles.

Q. And how long ago did you acquire that property?

A. 1936. [52]

Q. How many acres is that? A. 25.

Q. Have you had any recent offers to sell that property? A. No, sir.

Q. What per acre would be the smallest figure that you would sell your property for at this time?

Mr. Griffin: Objected to as incompetent, irrelevant and immaterial and nothing to do with the value here in this case.

Mr. Nichols: Only a value as to what the condition is in this general locality, as to asking and offering price.

Mr. Duffy: The objection is sustained.

By Mr. Nichols: Q. Do you know of any sales in this general locality recently?

A. Only by hearsay.

Q. When you say that you fix the market value of this property at $6000, what factors enter into your fixing the value at that figure?

A. That would be my personal figure on a basis that I think I could work it out.

Q. Would that be on the basis of what the property could be sold for within a reasonable time?

A. That would be hard to say. Too many things enter into the picture.

(Testimony of J. H. Nicholson)

Q. So the value you place on it would be the price on which you would be willing to purchase it? [53]

A. Yes, sir.

Q. And that is the sole basis for your fixing the market value at that figure of $6000?

A. Yes, sir.

Mr. Nichols: That is all.

Redirect Examination

By Mr. Griffin: Q. I believe you testified on direct examination that $600 was the market value of the property? Is that correct?

A. Well, my figure of $6000 is based on what I consider the value of the property would be to me.

Q. And that was based on—you figure that you obtain the property at a sacrifice or that would be the reasonable market value at the present time?

A. I would say it was the reasonable market value at the present time.

Mr. Griffin: That is all.

Recross-Examination

By Mr. Nichols: Q. If some other individual offered $10,000 for this property would that affect your opinion as to the market value?

A. That would not help me to work it out any better.

Q. Because you would not get the property, is that right? A. Yes, as far as I am concerned.

Q. So the only thing you base your opinion on is what you would be willing to pay for it, is that [54] correct?

A. Yes, sir.

Mr. Nichols: That is all.

Mr. Griffin: That is all.

Debtor rests. [55]

LYMAN M. KING,

called as a witness by the Petitioner, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Nichols: Q. Where do you reside?

A. Redlands.

Q. How long have you resided in Redlands?

A. Since 1902.

Q. What is your business or occupation?

A. I am in the Savings and Loan business.

Q. What office, if any, do you hold in that business?

A. I am president of it.

Q. What is the name of the Savings and Loan business?

A. Redlands Federal Savings and Loan Association.

Q. How long have you been engaged in that capacity?

A. Since 1931.

Q. Have you had any occasion to make appraisals of properties in the locality of Redlands and particularly in the locality of what is known as the Wumkes grove?

A. Not in that capacity. I formerly acted as State Inheritance Tax Appraiser and I did do some of that work then, but in this business that I am now engaged in we do not go into the orange growing business particularly. We deal in houses and lots almost altogether.

Q. Well, in connection with your residing in Redlands [56] since 1902 have you had occasion during that time to see citrus properties and form an opinion as to values?

A. Yes.

Q. Are you familiar with what is called the Wumkes property? A. Yes, sir.

Q. Have you ever had any occasion to go over that property? A. Yes, sir.

(Testimony of Lyman M. King)

Q. When was the first time that you recall?

A. Four years ago.

Q. In connection with what work was it that you looked at the property?

A. That was an independent appraisal that someone asked me to make. I think it was Mr. Sexton, the attorney, at that time.

Q. Did you make an appraisal at that time?

A. Yes, sir.

Q. And what, at that time, did you estimate the reasonable market value of the property to be?

Mr. Griffin: Objected to as incompetent, irrelevant and immaterial.

Mr. Duffy: It seems to me it is pretty remote. The objection is sustained.

Q. Have you had occasion to view the property at any subsequent time? A. Yes, sir.

Q. When was that?

A. Oh, last Sunday, or last Saturday.

Q. That would be April 29th?

A. Yes, if that is [57] what the calendar says.

Q. That was just last Saturday? A. Yes, sir.

Q. Did you go over the property at that time?

A. I did.

Q. Now, in your opinion is there a present demand for properties of the kind that the Wumkes property is?

A. Yes, sir.

Q. Did you form an opinion as to the reasonable market value of the Wumkes property? A. I did.

Q. What, in your opinion, is that value?

A. $8912.50.

(Testimony of Lyman M. King)

Q. Is that with or without the present crop on the property? A. That is without.

Q. With the present crop on the property, would that affect your appraisal of the reasonable market value at this time? A. Yes, sir.

Q. What was the reasonable market value—what would you say the reasonable market value of the property would be with the crop?

A. I figure the crop is worth at least $3,000.

Q. So that the reasonable market value with the crop would be $11,912.50? A. Yes, sir.

Q. Now, in arriving at the market value that you have just testified to, what conditions or circumstances did you have in mind in expressing an opinion as to the reasonable market value of the property? [58]

A. Well, figuring what would be the probable ceiling of the Valencia oranges.

Q. I mean of the land itself, in making your appraisal of the land itself, how do you arrive at the market value? A. Well, frankly, I go over it and to the best of my ability judge what I think it would sell for.

Q. Do you have in mind the best purpose for which the land can be used? A. Yes, sir.

Q. What, in your opinion, is the best purpose for which this land can be used?

A. I think the highest and best purpose for this land is for citrus growing.

Q. Then do you have in mind the highest price that can be obtained after a reasonable time to obtain that price for the property?

(Testimony of Lyman M. King)

A. Well, I never fix definitely in my mind a reasonable time. It would be say 30 or 60 days. It would be something like that because the trend is sometimes up or down.

Q. But the price you fix would be, in your opinion, the price at which the property could be sold or the price that you could find a purchaser willing to pay for this property?

A. Well, of course, I am not looking for purchasers myself.

Q. But I say, when you fix the figure of $8,912.50, that is what, in your opinion, the property could be [59] sold for within a reasonable time?

A. Yes, sir.

Q. Has there been any change in the demand for property of this nature in the past year?

A. Very considerably so.

Q. And that change has been what?

A. Upwards.

Mr. Nichols: That is all.

Cross-Examination

By Mr. Griffin: Q. Mr. King, you say that you are not engaged in selling ranch property or citrus property at the present time? A. No, I am not.

Q. Have you sold any orange groves or any citrus property in the last year, or two years?

A. Not of my own. I have appraised some that have been sold.

Q. But you have not acted as a real estate agent?

A. I do not act as a real estate agent at all at any time.

(Testimony of Lyman M. King)

Q. And the nature of your business in connection with the Redlands Savings and Loan is mainly in connection with the selling and buying of houses, is that correct?

A. The loaning of money on houses.

Q. And does not involve lending of money on citrus groves?

A. No, sir, except occasionally when there might be a home on a citrus grove. [60]

Q. Now, I think you said something about being an Inheritance Tax Appraiser. How long ago was it that you were acting in that capacity?

A. Well, I resigned, I think, about 8 months ago.

Q. And you have not acted in that capacity since that time?

A. No, sir, except such little matters as were being carried on and I had to finish them out.

Q. Now, do you know of any sales in this particular locality in or near this particular property?

A. Well, I have heard of a few.

Q. You were not a party to them nor did you have any part in the sales, is that correct?

A. That is correct.

Q. Now, does the history, the production history of the grove have anything to do with your arriving at a reasonable value of the property?

A. Yes, indeed, always.

(Testimony of Lyman M. King)

Q. Are you familiar with the production record of this particular property?

A. I have seen the record as it appeared in the statement of fact made by Judge Duffy at the former hearing.

Q. And did you from that record come to any conclusion as to the average production of that grove in any one year, or over a period of years?

A. No, I did not, because looking over the grove it [61] was my judgment that it had not been a fairly representative production.

Q. You mean that in the event the grove was fed heavier in the future that it would still produce more, is that right?

A. I think it will produce more if it is fed intelligently more in the future and there evidently has been something lacking in the past; it probably could have been corrected to some extent. That is my judgment, although I don't put that forward as a statement from an expert orange grower. I have owned several groves but I sometimes think the more I own the less I know.

Q. I suppose you noticed that in 1941-1942 there was quite a heavy crop on that grove, is that correct?

A. I seem to remember that, but I would not say that I definitely do.

Q. And did you happen to remember from the production record as to the yield of the grove last year?

A. Well, if it yielded much last year it was different from most of the groves in the district.

(Testimony of Lyman M. King)

Q. Do you remember as to the production record?

A. Not the crop before this one, no, sir, I don't remember the record.

Q. Now, did you walk over the entire grove recently?

A. Yes, sir, Saturday afternoon.

Q. And did you notice the condition of the grove as to [62] the rear portion of it?

A. Well, I suppose you mean the Lugonia Avenue as the front, then.

Q. That is right. A. I did.

Q. What would you say was the condition of the soil back there?

A. I would say in the upper rear portion very gravelly—very poor. I noticed that when I was there several years ago, too, and I really was surprised that the trees had done as well as they have done up in the most gravelly section of it. They are considerably stunted but yet they had quite a bit of fruit on them.

Q. How many acres would you say were in that portion that you speak of as being considerably stunted?

A. Oh, the whole thing is about 6, isn't it—something less than half an acre.

Q. And then as you came on towards the front of the grove and you got into the Navel trees there what did you find as to the condition of the soil there?

A. Well, it is better than it is at the extreme rear, but it gradually began to get gravelly as you went from the front to the rear.

(Testimony of Lyman M. King)

Q. What did you find was the condition of those Navel trees that were in there?

A. Well, there were hardly any Navel trees in it. Those were the Valencia trees up in that corner. It is what you might call the southwesterly corner of the tract. [63] It was very evident that the wash, as they call it, had gone across the corner of the place.

Q. Now, then, you arrived at a figure of $8,912.50 without the crop? A. Yes, sir.

Q. Can you tell me just how you arrived at that as far as an acreage proposition is concerned?

A. Yes, I arrived at that on an average of $1500 an acre for five and seven eighths acres.

Q. Can you tell me how you broke that average up, that $1500 an acre? What price did you put on the acreage in the rear?

A. Well, I did not, as you say, break it up. I don't know quite what you mean by that, but the great majority of that grove, the greater part of it, the soil is excellent and the trees look fine. If the entire five and seven eighths acres or six acres was like the front of it I would figure that it should, under the present market sell for more than that, and more or less roughly in my mind I reduced the price for the whole by the fact that there was some of it that was not worth very much—that little corner over in there.

Mr. Griffin: That is all.

Mr. Nichols: That is all.

FRED BROCK,

called as a witness by the Petitioner, having been first duly sworn, testified [64] as follows:

Direct Examination

By Mr. Nichols: Q. What is your name?

A. Fred Brock.

Q. Where do you reside? A. Redlands.

Q. What address? A. 533 South Buena Vista.

Q. What is your business or occupation?

A. Orange growing and real estate and dry farming.

Q. How long have you been engaged in the real estate business?

A. Since 1927, off and on during that time.

Q. Do you own some properties? A. Yes, sir.

Q. Are you familiar with the property called the Wumkes grove? A. Yes.

Q. Where is the property that you own with respect to the Wumkes grove?

A. I have one piece about a mile and a half south and west of there and part of another one about a mile and a half northeast of there.

Q. Now, are you familiar with any sales of citrus lands that have occurred in the past six months in the general locality? A. Yes, sir.

Mr. Griffin: Objected to as incompetent, irrelevant and immaterial and not proper direct examination. It could be offered on cross examination but not on direct. [65]

Mr. Nichols: I submit that one of the bases for establishing a market value in a locality is other properties of equal values or equal conditions that have been sold in the

(Testimony of Fred Brock)

general locality and within a sufficiently recent time to show that there is a demand and—

Mr. Duffy: Hasn't the Supreme Court decided that sales cannot be shown to show the value on direct examination?

Mr. Nichols: Well, I submit that in the Alberti case that sales in the general locality are cited as a criterion for establishing value.

(Argument by counsel.)

By Mr. Nichols: Q. What, if any, sales are you familiar with?

Mr. Griffin: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

By Mr. Nichols: Q. During the past 6 months you have been engaged in the real estate business, have you?

A. That is right.

Q. And what, if any, change has there been in the last year as to the demand for citrus properties?

A. A very decided change, more demand now than there is property to supply.

Q. Have you sold more than one citrus property during [66] the past six months? A. Yes.

Q. How many have you sold?

A. Roughly, 50 parcels.

Q. That has been in the general locality of the Wumkes property?

A. In the Redlands-Highland district.

Q. In your opinion is there a present demand for the Wumkes property? A. Yes.

Q. And, in your opinion, is there a ready market for the sale of the Wumkes property? A. Yes.

(Testimony of Fred Brock)

Q. And, in your opinion, what is the ready market and available price for which the Wumkes property could be sold?

Mr. Griffin: Objected to as incompetent, irrelevant and immaterial. He has not asked what the reasonable market value is.

Mr. Duffy: The objection is sustained.

By Mr. Nichols: Q. Now, are you familiar with what is termed the market value of property?

A. Yes.

Q. What do you understand the market value of property to be?

A. Well, it is your demand. In other words, your buyer today commits himself as to what he will pay for a piece of property if you can secure that type of property for him.

Q. Is that an immediate sale or within a reasonable time or upon what basis?

A. An immediate sale. [67]

Q. When you say "immediate sale" what do you mean? A. On or before 30 days.

Q. Do you have in mind in fixing market value any conditions as to the use of the property? Do they enter into your fixing the market value of the property?

A. I don't know exactly what you mean.

Q. Well, is market value affected in any respect in your opinion by the purpose or use to which the property can be put?

A. Oh, yes. If it is just vacant land it wouldn't be worth near as much as it would be with citrus on it.

(Testimony of Fred Brock)

Q. Now, the Wumkes property, what, in your opinion, is the best use to which that property can be put?

A. Citrus.

Q. And that is the use that it has been put to and is being put to now? A. Yes.

Q. Do you know of available purchasers for this property? A. Yes.

Q. What, in your opinion, is the present market value of the Wumkes property?

A. With the crop and the equipment, the heating equipment and water stock, $12,000.

Q. Now, assuming that the heating equipment would not go with the property how would you alter your opinion as to the market value?

A. That [68] would discount the price some. In that vicinity we always consider we need heaters in that area, more so than we do further east of there. It all depends on what the heaters would be worth, and the oil or the oil storage. We base the oil at four cents a gallon and the heaters at about $1.50 apiece.

Q. And the oil storage about what?

A. $25.00 per thousand for space.

Q. Do you recall whether there is any oil storage space on this property? A. That I don't know.

Q. Now, if the heaters on the property were not included on your estimate of the market value how would you change your estimate?

A. I would say a thousand dollars.

Q. So that, without the heating equipment you would estimate the property to be what?

A. $11,000 with the crop without the equipment.

(Testimony of Fred Brock)

Q. Now, do you know of an available purchaser for the property at that price? A. Yes.

Mr. Griffin. Objected to as incompetent, irrelevant and immaterial.

Mr. Duffy: The objection is sustained.

By Mr. Nichols: Q. Would you be willing to guarantee a sale of that property at that price within a period of 30 days?

Mr. Griffin: The same objection. [69]

Mr. Duffy: The same ruling.

By Mr. Nichols: Q. Now, with respect to other properties in this general location how is the Wumkes property located?

A. Location other than has been talked of here before, the southerly portion of it being a fairly sandy streak through there, it is a good average property for that district.

Q. And is the district in which the Wumkes property is located considered a good citrus district?

A. Yes, anything from that point west is always considered a good district, or north, either way.

Q. In your opinion what are citrus properties worth, that is, the market value of citrus properties in this general locality per acre?

A. Well, could I stipulate sales that have been made, that we have actually made?

Q. No, your opinion as to the market value of properties.

A. A similar property, about $2,000 an acre. We are actually selling up to $3,000 on the higher quality property.

(Testimony of Fred Brock)

Q. Now, your opinion as to reasonable market value is based on your knowledge of other sales that have been made? A. Yes.

Q. In this general locality? A. Yes.

Q. And how recently?

A. Within the past 60 days.

Mr. Nichols: That is all. [70]

Cross-Examination

By Mr. Griffin: Q. You say that your opinion is based on other sales. Is that the only element that you took into consideration in fixing your opinion of market value?

A. No, it is the condition of the property, the varieties. Location has something to do with it.

Q. Are you familiar with the crop record of this property? A. I have seen the crop record.

Q. Over a period of years? A. Yes.

Q. Do you mean to tell this court that the crop record and production of this grove over a period of years would justify an appraisal of $2,000 an acre?

A. Buyers in most cases today never question what the best production is. It is "Can I have the property."

Q. Are they interested in speculating on it? Is that the reason they are buying?

A. No. They have surplus money that they want to invest.

Q. They have surplus money they want to invest?

A. That is right.

Q. Do you know for what purpose?

A. Well, where it will draw them a little more than one percent interest and what they are getting in the banks, mainly.

(Testimony of Fred Brock)

Q. And do they take into consideration other reasons [71] besides merely getting one percent on their investment?

A. There has been a trend of going back to the land is why there is quite a demand for properties right now. They feel that is as safe an investment as they can make.

Q. You are selling property, are you, as a real estate man? A. Yes, sir.

Q. And have you been able to compute for these prospective buyers how they are going to make a profit on property buying it at $2,000 an acre or $3,000, as you spoke of?

A. Yes, I have always taken records on properties and whether they demand the records or not we have sat down and figured out over the various years the number of boxes and the returns both. We have done that and it is entirely up to them if they want to buy it. Whether it will pay them three percent then or whether it will pay them ten percent it doesn't make any difference to us. We are just acting as brokers spending their money.

Q. A great many of these purchasers that you have met are merely buying with the thought of selling, aren't they, very quickly?

A. No. The government tax prohibits that.

Q. Haven't some of the sales that you have made and noticed where the man bought and then sold for a loss for the purpose of taxation purposes? [72]

A. No.

Q. It has not? A. No.

Q. Now, you say there is a $3,000 crop that you are figuring in this $11,000. Is that right?

A. My figure was $12,000.

(Testimony of Fred Brock)

Q. What crop did you figure into that?

A. I figured $3,000.

Q. Well, do you think that that $3,000 is all profit?

A. No, sir.

Q. It costs something to produce something doesn't it?

A. We set aside $200 a year for upkeep and maintenance.

Q. Doesn't that estimate, with the new pest control coming in, hasn't that gone up to more than $200 an acre?

A. No. Of course, we have our taxes here cut roughly $5.00 an acre. I would say $200 would be more than enough. We have spent less than $200.

Q. Are you familiar with the production of that grove last year?

A. No, I have not the record for the last year, but I know we were all away under last year.

Q. You know it was a very poor crop last year?

A. Yes.

Q. Now, if you learned that the last year crop was only somewhere around 700 boxes, that grove would [73] take less last year, wouldn't it?

A. That is right.

Q. Haven't groves in that particular area been in what we may say "in and out" groves—one year they produce heavily and another year they drop off?

A. That is characteristic of the Valencia in that particular area. Not to a great extent except a year like last year. I had it myself last year.

Q. Practically everybody over in that area had it last year? A. That is right.

Q. Your Navel tree is very likely, though, a more consistent producer? A. That is right.

(Testimony of Fred Brock)

Q. Do you know what the crop record of that grove averages over a period of years?

A. I have not the figure right in mind, no.

Q. In the event the crop record shows that it ran approximately 3 boxes to the tree a year would you say that it was a marginal producer or a heavy producer?

A. It would not be what we would class as a top notch property, nor would it be what we call rat tail. It is a medium property. I might say this. What I mean by that, we class a grove that will produce 500 boxes to the acre or better, that is what we class as our top grade properties. Anything that goes down to two thousand boxes or in between there—it is 2500 boxes to 10 acres, [74] we will say—that is classed as between that and 5,000 is a medium class, and anything from that point on down is classed as what we call rat tails.

Mr. Duffy: You mean per acre?

A. Yes, 250 to 500 boxes per acre.

Mr. Duffy: And not 2,500 to 5,000?

A. No, that is what we call our medium class.

By Mr. Griffin: Q. Are these persons that make up this demand that you speak of—you say that they have money—are they people that own citrus property or are they new people in the field?

A. Well, we have both. Most of them have a pretty good knowledge of the citrus business. Those that are not in the local area, an out of town area, they have a pretty good knowledge of the citrus business.

Mr. Griffin: That is all.

Mr. Nichols: That is all.

K. C. O'BRYAN,

called as a witness by the Petitioner, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Nichols: Q. Where do you reside?

A. Redlands.

Q. How long have you lived in that locality?

A. Most of the time since 1926. [75]

Q. What is your present business or occupation?

A. I am with the Southern Citrus Association.

Q. What is that? A. A packing house.

Q. That is located in Redlands? A. Yes.

Q. How long have you been connected with the Southern Citrus Association? A. 7 years.

Q. Do you own any citrus property of your own?

A. Yes.

Q. More than one parcel? A. Yes.

Q. How many parcels do you own?

A. Well, including some partnership parcels, seven.

Q. Seven parcels? A. That is correct.

Q. Are those in the general locality of the Wumkes property? A. Some.

Q. Now, are you familiar with the Wumkes property?

A. I am.

Q. Where is the Wumkes property situated with relation to the citrus properties in Redlands?

A. Well, it is more or less the middle of the Redlands district.

Q. Is it situated in a good or bad citrus district?

A. What is considered a good district.

(Testimony of K. C. O'Bryan)

Q. What is the condition of properties around the Wumkes property?

A. You mean physical condition of the groves in that neighborhood?

Q. Yes. A. Generally good.

Q. How long have you been familiar with the Wumkes [76] property?

A. Since 1936, I believe.

Q. And at that time were you handling the fruit from the property? A. Yes.

Q. And when was the last time that you handled any of the fruit?

A. I am not sure what the last year was.

Q. When you were handling the fruit did you have occasion to go and see the property? A. Yes.

Q. When was the last time that, or how recently did you go and look at this property?

A. Last Saturday.

Q. Has there been any change in the condition of the property from the time you first looked at it until the present time?

A. Yes, a very great improvement.

Q. Are you familiar with other properties in that general locality? A. I am.

Q. And is there at the present time a demand for citrus properties? A. Yes.

Q. Do you know what the term "market value" is, what it implies? A. I think I do.

(Testimony of K. C. O'Bryan)

Q. What, in your opinion, does the term "market value" mean?

A. I would think it would mean the price that a grove could be sold for and a buyer could be found within a reasonable time.

Q. Would that have in mind the purpose for which [77] the property could be used? A. Yes.

Q. Is the locality of the Wumkes property, in your opinion best suited—what is it best suited for?

A. Growing citrus.

Q. The other properties in the immediate locality are used for that same purpose? A. Yes.

Q. Are you familiar with other transactions or sales that have occurred in that locality? A. I am.

Q. Have you formed an opinion as to the market value, reasonable market value of the Wumkes property?

A. I have.

Q. What, in your opinion, is the reasonable market value of that property?

A. I think it is worth $12,500. However, I come over here prepared to make an offer of $10,000 for it, all cash.

Mr. Griffin: I move to strike the last part of the statement out as incompetent, irrelevant and immaterial.

Mr. Duffy: The last part may be stricken out.

By Mr. Nichols: Q. In your opinion, the market value of the property is $12,500? A. I think so.

Q. Is that with or without the crop?

A. With the crop, with the Valencia crop.

Q. What do you estimate the Valencia crop to be [78] worth? A. $3500.

(Testimony of K. C. O'Bryan)

Q. So that your valuation without the crop at this time is $9,000?

A. Yes, but I am willing to pay $10,000 with the crop.

Mr. Duffy: Mr. Witness, you will not volunteer any more information. Let the last part of the answer be stricken out.

By Mr. Nichols: Q. Are you prepared at this time to make a cash offer for the purchase of this property?

A. I am.

Mr. Griffin: Objected to as incompetent, irrelevant and immaterial.

Mr. Nichols: At this time I would like to offer proof by a cash offer and I will tender proof of a cash offer in the amount of $10.000 for this property and tender herewith cash in the amount of $50 and a certified check in the amount of $950, being ten percent of the amount of the offer. I am handing that over to you at this time, Mr. Duffy.

Mr. Duffy: I cannot accept anything of that kind.

Mr. Griffin: Objected to as incompetent, irrelevant and immaterial.

Mr. Duffy: The objection is sustained. Now, this money is not under my jurisdiction so you better get it away from here as I am not responsible. [79]

Mr. Nichols: If you are refusing to entertain the offer in any way—

Mr. Duffy: I have sustained the objection to the offer.

By Mr. Nichols: Q. Now, Mr. O'Bryan, you have gone over this property on more than one occasion, have you? A. I have.

(Testimony of K. C. O'Bryan)

Q. What is the condition of the soil on this property?

A. It is in general typical of the district. There is one corner of the grove that is somewhat gravelly which, with organic fertilizer could be probably built up. I know many high producing groves in gravel.

Q. Are there some stunted trees on the property?

A. A few.

Q. And about how many, in your opinion, are there?

A. Oh, probably 40 or 50 that are noticeably stunted, and that many more that are somewhat smaller than they should be for their age to produce well.

Q. When you say they are producing well do you have any opinion as to the number of boxes those stunted trees would produce?

A. I think the smallest ones will probably average about 2 boxes.

Q. About what percentage of the entire grove is occupied by stunted trees? A. 10 or 11 percent.

Q. And the 89 or 90 percent remaining would be in [80] what type of citrus trees?

A. You mean as to size?

Q. As to size and quality.

A. Better than average size.

Q. Now, there has been some testimony that these trees would never produce properly because they were planted too close together. Do you have any opinion as to the distance between trees, that is, the planting distance? A. On that particular property?

Q. Yes.

A. Well, they are not over 20 feet. They may be a little less than 20; they are 18 to 20 feet apart.

(Testimony of K. C. O'Bryan)

Q. Now, is it unusual in citrus groves for trees to be planted 20 feet apart?

A. Not particularly. We have lots of groves planted that close. Some of the best producing groves we pick in our packing plant are planted close, in fact, we are picking on a grove right today which is planted much closer than this one, a 30 acre piece that is going to pick somewhere in the neighborhood of 22,000 boxes of fruit, planted approximately 12 by 21 feet.

Q. The manner in which this property is planted with respect to the distance that the trees are apart, would or would not, in your opinion, hamper or affect the ability to prune or cultivate the property?

A. Well, naturally to get through a close planted [81] grove it is a little closer for tractors, but so far as hampering operations, our highest producing groves in our Redlands area, the trees are close. The fruit has to be sledded out. You cannot go in there with a truck.

Q. Would you say that, taking the average citrus grove in Redlands area, that there was anything unusual in the manner in which the trees are planted as to distance apart on the Wumkes property?

A. Yes, they are slightly closer than most groves, but it is no disadvantage. It is an advantage, a lot of trees to the acre.

Q. And this property is in a good citrus location, is it? A. Yes.

Q. And its best use is in the citrus growing?

A. That is the best use I know of for it.

Q. And based on the demand that you are familiar with in the locality you fix the market value at $12,500?

A. Including the crop.

Mr. Nichols: That is all.

(Testimony of K. C. O'Bryan)

Cross-Examination

By Mr. Griffin: Q. Mr. O'Bryan, you said that the small trees in the back, which you, I understand, estimated at about 11 percent of the grove approximately, would average about 2 boxes to the tree?

A. The present crop. [82]

Q. Now, in other years that would drop off, would it? A. Not necessarily.

Q. Do you think that the crop that is on there now is a big crop or is it not a big crop?

A. I think it is a big crop.

Q. Are you familiar with the history of the grove?

A. Roughly.

Q. Has it been in accordance with the history of the grove a big crop or not?

A. Yes, it is a better crop than—possibly one year it had a better crop, possibly 2 years since I have known it. It had a very long term of very poor crops due to a reason which has now been controlled. That reason was black scale. That grove, in all the years from the first year I knew it back about 1936, was badly infested with black scale and as the years went by it was controlled more or less and the crop went up and down and now that that black scale has been licked there is no reason why that grove should not grow better crops than it is growing today. So far as last year's crop is concerned, black scale, I don't think, had anything to do with that. The light crop last year was due, I think, to—well, the experts say it was due to little moisture content in the sub-soil. The fact that the grove had a light crop in our district last year is no argument [83] against the grove because

(Testimony of K. C. O'Bryan)

some of the best groves that we picked fell down to seven or eight hundred boxes to the ten acres last year. We have one grove that consistently ran eight to ten thousand boxes on a 15 acre piece, which last year we only picked a little over 1200 boxes, so last year is no criterion for groves in our district as a whole in Valencias. Last year we picked a little over thirty percent of a normal crop in Valencias. In Navels a little over forty percent.

Q. Now, you think that the rest of the grove, however, is a better grove from the remaining portion?

A. You mean the grove other than the back corner?

Q. Yes. A. Oh, yes, much better.

Q. And yet the history of the grove has never shown that it is a heavy producer, has it?

A. No. The answer is black scale.

Q. You feel that the black scale has been entirely eradicated?

A. I would call the grove commercially clean. It might be possible to find a stray scale in it here and there.

Q. Won't that back history of production have something to do with the sale price?

A. Yes. However, to a prospective buyer who knows groves and knows how black scale can affect production, I think that he would make allowance for the fact that the [84] back production has not been high.

Q. Do you think there is anything else other than black scale that might be taken into consideration in the low returns from that grove?

A. Yes, low markets, of course, have a bearing on returns as well as production. When you said "return" did you mean money return or fruit return?

(Testimony of K. C. O'Bryan)

Q. Fruit return?

A. Oh, yes, other things than black scale have an effect on the fruiting of a grove.

Q. Do you agree with Mr. Aubrey and Mr. Johnson and Mr. Mehl in reference to these small stunted trees in the rear of that grove?

A. I don't know that they agreed on it. I cannot answer that question unless you make it a little more specific.

Q. Do you agree that those trees are stunted in the rear and very poor producers?

A. I agree that there are some few stunted trees, yes.

Q. And yet you are fixing a value on that property better than $2,000 an acre over all, is that correct?

A. Yes, including the crop.

Q. Last September you only felt that place was worth $8,000, didn't you?

A. I believe $8,000 or $8,500; I am not sure which it was.

Q. Do you feel that there has been a jump in value since that time?

A. Yes, I think there has [85] been a jump in value as well as in price. Since that time they have made known the fact that our Valencia ceiling would be, roughly, a cent a pound more money than we were sure of at that time, and therefore the money return from that crop and probably from future crops would be greater than we knew at that time.

Q. In other words, the figures—the increase in value is due to an increase in price of oranges, is that right?

A. Partially.

(Testimony of K. C. O'Bryan)

Q. And that is based on the gamble of whether the demand is going to continue on these?

A. Well, that is based on a gamble, yes, insofar as there is a gamble or a hazard in any business or any transaction. We are mighty sure that the national taste for oranges is not going to change.

Q. You are not selling oranges to the general public now, are you? Isn't the majority of your crop going overseas? A. No.

Q. Don't you have a freeze on the sale of citrus products at the present time to civilians? A. No.

Q. That is at least in the canned production?

A. No.

Q. Would you say that the major part of the citrus crop at the present time is being consumed in the [86] United States? A. I would.

Q. Has the expense of production of a crop been increased recently or not?

A. Yes, slightly in the case of a man who does his own work. Somewhat more in the case of a man who hires all his work done.

Q. Has it been increased by reason of red scale?

A. Red scale has been known and fought for all the years of my experience in the business. Red scale is not a new thing although there are more groves in the Redlands area now where it is necessary to give them red scale treatment than in the past.

(Testimony of K. C. O'Bryan)

Q. In this grove—if this grove did not have the crop on it at the present time would that materially affect the sale price of the grove?

A. In general, or to me?

Q. In general.

A. Yes, the grove without the crop would not sell for as much money as it would with the crop.

Q. What would you say would be a reasonable market value of the grove without the crop? A. $9,000.

Q. The price you fixed on there is not the entire value of the crop being taken off of the price that you had fixed for both the crop and the grove, is it?

A. Ask that question again.

Q. You have not deducted the entire value of the crop from your price, have you? A. What price? [87]

Q. $12,500.

A. I have not deducted the entire value of the crop?

Q. That is right.

A. I think the place is worth, the place and the crop is worth $12,500. I think the crop is worth $3,500. I think the place without the crop is worth the difference between the two figures.

Q. You feel if you asked somebody out there and they looked at it without the crop on it that it would still sell for $9,000? A. Yes.

Mr. Griffin: That is all.

Mr. Nichols: That is all.

TED PRATT,

called as a witness by the petitioner, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Nichols: Q. State your name.

A. Ted Pratt.

Q. Where do you reside? A. Pomona.

Q. What is your business or occupation?

A. I work in the field for the Orange Belt Fruit Distributors in Pomona.

Q. What is the Orange Belt Fruit Distributors?

A. They are packers and shippers of citrus fruits as well as growers. [88]

Q. What acreage do they own in the way of citrus acreage if you know? A. About 550.

Q. Is it necessary for you, in the performance of your duties with them, to inspect properties in the Redlands district? A. Frequently.

Q. And are you familiar with the property called the Wumkes property? A. I am.

Q. When did you go over that property?

A. Yesterday.

Q. Are you familiar with the demand for property in the general Redlands area? A. Well, yes.

Q. Now, did you go over the entire Wumkes property?

A. Yes, sir.

Q. In your opinion in what type of location is the Wumkes property, having in mind the character of the other properties in that general location?

A. I would say it is a very fair district.

Q. Would you say it is well located with respect to the other properties? A. Yes.

(Testimony of Ted Pratt)

Q. What, in your opinion would be the quality of citrus properties in that general location?

A. Very good.

Q. When you went over the property did you form any general opinion as to the market value of the Wumkes property? A. I did.

Q. What was your opinion as to the reasonable market [89] value? A. With the crop, $12,000.

Q. And without the crop, how much?

A. $9,000.

Q. You estimated the crop at—

A. I estimated the crop at 1500 boxes. It might be a little more than that in dollars and cents.

Q. When you testify as to the reasonable market value, what do you mean?

A. Well, the use of the land for its most practical purpose and the value of the trees and water stock. It is not its potency, particularly, but its production. I investigated the crop record.

Q. And is it your opinion as to the sale of the property within a reasonable time, that is your estimate of the market value is based on the price that can be obtained for it within a reasonable time? A. Yes, sir.

Mr. Griffin: Objected to as being leading and suggestive.

Mr. Duffy: Well, I think he answered it.

By Mr. Nichols: Q. Now, did you look at the property with respect to the distance at which the trees were planted apart?

A. Yes, I did. I did not step them off, but I know they were close, 20 feet or slightly less.

(Testimony of Ted Pratt)

Q. In your opinion would the fact that the trees were close together lessen the value of the property? [90]

A. No, not in my opinion. I prefer heavy planting.

Q. Do you own any citrus properties yourself?

A. Yes, I have two.

Q. Do you take care of them yourself? A. Yes.

Q. What, in your opinion, would be the generally accepted distance at which trees would be planted in this area?

A. That is a hard question for me to answer. I will say that in our district the average is 22 feet.

Q. From your observation of trees planted in this area would you say it would be anything unusual to find property where the trees were planted the same distance as the Wumkes property? A. Not at all.

Q. In your opinion, would the fact that the trees were planted as they are on the Wumkes property lessen the production of the property?

A. No, sir, not at all.

Q. Would it make the property any less desirable?

A. None at all.

Cross-Examination

By Mr. Griffin: Q. How long have you been with the Orange Belt Fruit Distributors? A. 3 years.

Q. What was your occupation before that?

A. Salesman. [91]

Q. What line of business?

A. Automobiles, during which time I owned a grove, however.

Q. Over what period of time was that?

A. 1930 to 1940.

Q. About 10 years? A. Yes.

(Testimony of Ted Pratt)

Q. What is your capacity now?

A. Well, I am licensed as Growers' Service Advisor. My principal work is to follow after their properties and to inspect them and to appraise crops and groves for our growers, and when I say "appraise them" I don't mean for the purpose of sale or for buying them but for company protection in advances on various crops.

Q. Do you have groves, that is, do you have members who have groves in the Redlands district?

A. No, we have none.

Q. Then, for what purpose were you in the Redlands district?

A. I get into the Redlands district very frequently to look at crops.

Q. That is for the purpose of buying crops?

A. Occasionally, or advancing money to growers.

Q. That is, advance money to growers upon the crop that is then on the trees? A. Yes.

Q. Do you know anything at all about the sales of property in Redlands or in the Redlands district?

A. Only what my investigation has been through various agencies such as real estate firms and [92] packing houses where I have made inquiries.

Q. You have not conducted any sales yourself?

A. No.

Q. Or been a party to any sales? A. No.

Q. I understand you to say that you had investigated the crop record of this particular grove?

A. That is correct, yes, sir.

(Testimony of Ted Pratt)

Q. What did you find from that crop record?

A. I found that for a period of 6 years including the crop as I estimate it on the trees today, the grove produced between $13,000 and $14,000, provided the estimate of this year's crop is reasonably accurate.

Q. Could you give me that in boxes?

A. No, I couldn't. I merely looked at the record, so I couldn't do that without looking at it.

Q. The crop record is made up in amounts?

A. It is made up both in boxes and amounts, but I cannot call them from my mind.

Q. Did you walk over the grove? A. Yes, sir.

Q. Would you say that grove was a heavy producer?

A. Not right at the present time, I wouldn't. I would say it is, potentially the grove is a heavy producer, that is, that part of it, those trees in the back, which some of it should come out but the remainder of the grove is potentially a good producer. [93]

Q. There are some trees in the back that you feel are a detriment?

A. I would say that less than half of them are badly stunted—not badly stunted but possibly a tree that would seem to me would be 12 or 14 years old is possibly 16 or 17 years old. They are pretty healthy now. They are a good color and a fairly good crop.

Q. Do you feel that that grove is worth $2,000 an acre? A. With the crop?

(Testimony of Ted Pratt)

Q. No, without the crop.

A. No, I did not make such a statement.

Q. I will ask you do you feel that?

A. No, I say that the crop—with the crop it is worth $2,000 an acre.

Q. The value of this half acre in the back has no value at all, has it? A. Yes, it has.

Q. What would you say is the value?

A. I think there is no question but what those trees can be improved. They are improving all the time from the history I get.

Q. You don't feel that these trees should be taken out? A. Oh, there are a few.

Q. How many?

A. Oh, maybe 5 or 6 trees all together.

Q. Then your former statement of a half acre is not correct?

A. I said there were a half acre of [94] stunted trees but a few should come out.

Q. You don't feel that all of them should come out?

A. By no means. If that grove was properly cared for and irrigated more frequently in the lighter soil it would do a tremendous amount of good.

Q. Do you know how much water it has on it?

A. I was told how much water it had, but I don't recall offhand, but it was adequate. I was told the num-

(Testimony of Ted Pratt)

ber of shares and also the number of inches and the frequency with which water in those amounts were given.

Q. How many times did you go over this property?

A. One time.

Q. How long were you in the grove?

A. Oh, possibly 2 hours.

Q. Who was with you? A. I was by myself.

Q. When was that that you went in the grove?

A. Yesterday.

Q. You had never seen the grove before?

A. Never.

Q. Had you ever been in that immediate vicinity before?

A. I have driven the Redlands area many, many times. I am not familiar with the groves by name.

Q. I mean in that vicinity.

A. I have been on the same street, yes. [95]

Q. Your particular position is to recommend the advancement of money or the payment of money for a crop, is that correct?

A. No. I do general field work, but if the occasion arises, if the company desires an appraisal either on crops or groves I am the one that is sent out to do it.

Q. Isn't that usually for the purpose of advancement of money?

A. What they ask me for is the appraisal or the crop estimate. I have nothing to do with the financial end of the business.

(Testimony of Ted Pratt)

Q. Don't you take into consideration in determining what a grove is worth as to the amount of return that that grove will bring?

A. I certainly do, yes, sir.

Q. And didn't you—don't you somewhat go on the past history of the grove? A. I certainly do.

Q. You don't expect miracles in a year or two, do you, in change?

A. No, but I would certainly feel that a grove that would net ten percent on $60,000 for six years should be worth $9,000, and if you took $200 an acre out for operation, as near as I could figure that is what you would have left.

Q. That has not been the back history of the grove, has it?

A. I have only had the history for the last six years. Incidentally, two very poor years. [96]

Q. And two good years?

A. Yes, two good years. I understand it had good years previously. That I don't know. The way the grove looks today and the amount of money that it has returned over this 6 year period, allowing $200 per acre for care, I think it is a good $9,000 investment without the crop.

Mr. Griffin: That is all.

PETER J. WUMKES,

called as a witness by the Petitioner, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Nichols: Q. Dr. Wumkes, you formerly were the owner of the property that we have called the Wumkes property? A. Yes.

Q. You sold that to Mr. and Mrs. Powell?

A. Yes, sir.

Q. What was the sale price of that property and when did you sell it to them?

A. The offer was made to me signed by Mr. Powell—

Q. Just tell me when you sold it.

A. $13,500 was called for—$2500 down payment.

Q. When was this when it was sold?

A. The summer of 1937 or 1938; I don't recall when.

Q. Now, you are familiar with properties in the [97] general locality of this property?

A. Yes, I lived there for 5 years.

Q. Are you familiar with the market value of properties in that area at this time? A. Yes.

Q. What, in your opinion, is the market value of this property?

A. Well, I offer to take the property back—

Q. Just answer the question please. What, in your opinion, is the market value of this property?

A. I believe that the property there is in direct line with what has been testified today, $12,000 or $12,500. I believe there is a little something more of crop there than has been testified to.

(Testimony of Peter J. Wumkes)

Q. In your opinion, what is the present market value of this property?

A. I would say as an investment it should show adequate returns—

Mr. Griffin: I object to that.

Mr. Nichols: All I want is the amount.

A. I would say somewhere between $13,000 and $15,000. $2,000 to $2,500 per acre.

Q. Would you be willing to take this property and cancel the indebtedness that you hold against it?

Mr. Griffin: Objected to as incompetent, irrelevant and immaterial.

Mr. Duffy: The objection is sustained.

Mr. Nichols: That is all. [98]

Cross-Examination

By Mr. Griffin: Q. What is your business or occupation or profession?

A. Well, I have been rather free lancing it for the last 2 or 3 years. I have retired from dentistry.

Q. You were a dentist? A. Yes, sir.

Q. You have retired from that? A. Yes, sir.

Q. You lived for a time in Redlands? A. Yes.

Q. And while there what was your occupation?

A. I was orange grower and farmer.

Q. Did you have any other occupation?

A. No, essentially not. I had other interests, but it did not require any of my time.

Q. Then you have left Redlands, have you?

A. Yes.

(Testimony of Peter J. Wumkes)

Q. Where are you living now?

A. I am spending most of my time—some time in Pomona and a considerable time in Los Angles.

Q. What is your occupation there?

A. Well I am more or less free lancing. I am not employed at the moment. I have been doing some war work, functioning with such capacity as I could, but at the moment I am not employed.

Q. Do you own any other citrus properties in or about Redlands?

A. No, I have no interest in Redlands other than my interest in the equity in [99] this property.

Q. You have been spending most of your time in and around Los Angeles and Pomona, is that correct?

A. Yes.

Q. How much time have you spent in and around Redlands in the last 6 months?

A. I have been there on two occasions. I was there last Thursday and I was there yesterday.

Q. Those were the only occasions you have been in Redlands?

A. Within the last 6 months, yes. It has been the last time in nearly 3 years that I have been there.

Q. How many times have you been in Redlands the last year?

A. Just the twice, last Thursday and yesterday.

Mr. Griffin: That is all.

Mr. Nichols: That is all.

Petitioner rests.

Debtor rests.

[Endorsed] Filed Jul. 14, 1944. [100]

[Endorsed]: No. 10945. United States Circuit Court of Appeals for the Ninth Circuit. James Goodwin Powell and Anna Strachan Powell, husband and wife, Appellants, vs. Peter J. Wumkes, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed December 18, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
Southern District of California
Central Division

No. 36775-C

In the Matter of
JAMES GOODWIN POWELL and
ANNA STRACHAN POWELL,
husband and wife,

Debtors.

STATEMENT OF POINTS ON APPEAL

To the Above Honorable Court:

Appellants hereby designate the following points upon which they intend to rely upon said appeal, as follows:

I.

That the Honorable District Court of the United States erred in vacating, setting aside and annulling the Order of the Conciliation Commissioner-Referee determining value of debtors real property, dated June 21, 1944.

II.

That the decision of the District Court of the United States was contrary to the law made and propounded for such matters.

III.

That the District Court admitted and considered improper and illegal evidence in the making of said decision, and each of them, to-wit, the affidavits and offers to purchase of Donald D. Wyllie and L. A. Turner, and others.

Dated this 27 day of December, 1944.

H. R. Griffin
Attorney for the Debtors and Appellants.

[Endorsed]: Filed Dec. 29, 1944. Paul P. O'Brien, Clerk.

No. 10945

In the United States
Circuit Court of Appeals
For the Ninth Circuit

JAMES GOODWIN POWELL and ANNA STRACHAN POWELL, husband and wife,
Appellants,

vs.

PETER J. WUMKES,
Appellee.

Appellants' Opening Brief

H. R. GRIFFIN,
Katz Building,
San Bernardino, California
Attorney for Appellants.

Barnum & Flagg Company, San Bernardino, California

TOPICAL INDEX

TABLE OF CASES CITED

No. 10945

In the United States
Circuit Court of Appeals
For the Ninth Circuit

JAMES GOODWIN POWELL and ANNA STRACHAN POWELL, husband and wife,
Appellants,

vs.

PETER J. WUMKES,
Appellee.

Appellants' Opening Brief

RECORD ON APPEAL

This proceeding is to review the decision of the Honorable Paul J. McCormick, Judge of the United States District Court, vacating, setting aside, and anulling the Conciliation Commissioner-Referee's Findings of Fact, the Conclusions of Law, and the Order of the Conciliation Commissioner-Referee determining value of debtors' real property, dated June 21, 1944.

The Record on Appeal contains the complete record and all of the proceedings and evidence in the above matter.

Said transcript of record is herein referred to by the letter "T"and the pages by their number.

JURISDICTION

The right of the Court to review the Orders of the Conciliation Commissioner has been repeatedly recognized. Perhaps one of the most recent cases on this point is Rait v. Federal Land Bank of St. Paul. (135 Fed. 2d 447).

STATEMENT OF THE CASE

Appellants, Powell and his wife, were engaged in farming operations, to-wit, growing citrus products. The property consisted of two adjoining parcels of land, one approximately 4.2 acres in size planted to citrus trees, with a house, garage, poultry house thereon, etc., being encumbered with a Trust Deed in favor of one Frank Clark, and the second parcel adjoining the Clark property consisting of approximately 5-7/8ths acres planted to citrus and encumbered by a Trust Deed in favor of Peter J. Wumkes. For purposes of clarity, reference to each grove hereafter will be by the use of descriptive words such as "Clark Grove or Wumkes Grove." For purposes of brevity, parties may be referred to hereafter by the use of the last name, such as, "Powell, Clark or Wumkes."

On the 25th day of July, 1940, Powells filed their Petition and Schedules, the debts consisting of the taxes, trust deeds on the property, and a small balance on a car, but no other debts. Thereafter the proceedings were referred to Hon. Fred Duffy, United States Conciliation Commissioner for the County of San Bernardino. Having been unable to secure acceptance or confirmation of their extension proposal, Powells then filed their amended Petition, and on October 24, 1940, they were adjudicated bankrupts under Section 75(s) of the Bankrupt Act (T-16).

Thereafter and on June 16, 1941, the Commissioner made his Order staying proceedings for three years and fixing the rental for said property.

On December 23, 1942, Powells filed a Petition requesting reappraisal or hearing to determine value of the real property, which said matter was set down for a hearing by the Commissioner and after numerous continuances made at the request of Wumkes' attorneys, was reset for March 3, 1943, and on the 9th day of April, 1943, said Commissioner entered an Order determining the value of said real property. That a Petition for review was taken therefrom to the District Court and Judge Leon R. Yankwich of the District Court reversed the Commissioner's decision and the Honorable Circuit Court of Appeals in the case of Powell vs. Wumkes, No. 10610, affirmed the decision of Judge Yankwich.

That in accordance with the Order of the Court on the 2nd day of May, 1944, a rehearing on the Petition to determine value of debtors' real property came on for hearing before the Conciliation Commissioner, and present at said hearing were the debtors, their attorney, H. R. Griffin, the Petitioning Creditor, Peter J. Wumkes, and his attorneys, Nichols-Cooper & Hickson, by Donald P. Nichols.

Oral testimony and documentary evidence being introduced, and the matter was submitted for decision, and on the 26th day of May, 1944, the Commissioner rendered his decision, (T-12), determining that the value of the property was $5,575.00. Appellee then petitioned the District Judge for a review (T-30:1-34), and also at the time of the hearing before Judge McCormick presented certain affidavits (T-36; T-38). Objection to the omission of said affidavits was made by debtors' attorney, and on Septem-

The third witness was J. W. Mehl, who now is and since ber 23, 1944, the Court overruled the objection and ordered said affidavits filed and considered (T-39), and also entered an Order vacating the Commissioner-Referee's Order determining value and recommitting the matter back to the Conciliation Commissioner for a further hearing (T-40). Then, from this Order and Judgment of the Honorable McCormick, this appeal is taken.

STATEMENT OF POINTS ON APPEAL

To the Above Honorable Court:

Appellants hereby designate the following points upon which they intend to rely upon said appeal, as follows:

I.

That the Honorable District Court of the United States erred in vacating, setting aside and annulling the Order of the Conciliation Commissioner-Referee determining value of debtors' real property, dated June 21, 1944.

II.

That the decision of the District Court of the United States was contrary to the law made and propounded for such matters.

III.

That the District Court admitted and considered improper and illegal evidence in the making of said decision, and each of them, to-wit, the affidavits and offers to purchase of Donald D. Wyllie and L. A. Turner, and others.

ARGUMENT

Perhaps in approaching this matter it would be well to bring to the court's attention some of the testimony as produced at the hearing before the Conciliation Commissioner, and perhaps the language of the Conciliation Commissioner given in his decision is one of the clearest and most concise ways of presenting these facts. Therefore, we find that at the time of the hearing of the Conciliation Commissiner, Powell produced three eminently qualified appraisers, one being Charles Aubrey, engaged in appraising lands for over 25 years in different parts of the United States, including the County of Ventura, Los Angeles, Orange, Riverside, San Bernardino, and 11 other counties in the State of California, who had appraised property for the New York Life Insurance Company, on farm lands, has appraised property for the Federal Land Bank, appeared as witness on various appraisals in the Federal Court, has been supervisor of Farm Security Administration, who determined the value of Wumkes' property to be $5,200.00. (T-12).

The second witness, W. H. Johnson, who has been in real estate and appraising business for over 20 years, was connected with the Redlands-Yucaipa Land Company, whose business was developing fruit land, subdivisions, operator of deciduous orchards for 30 years, has acted as an appraiser on several occasions in the Superior Court and in the Federal Court, who has made a thorough study of the property in question, drawing a plat showing condition of trees, photographs, etc., and fixed the market value of said property at $5,400.00. (T-13).

1931, has been the Inheritance Tax Appraiser of the State of California, in and for the County of San Bernardino, and that he has appraised considerable citrus property and other property during said 13 years experience; that upon a consideration of all of the elements which should enter therein, he determined the value of this property to be $5,575.00. (T-13).

As against this testimony, the Creditor, Peter J. Wumkes, produced Lyman M. King, President of the Redlands Federal Savings and Loan Association, dealing almost exclusively in houses and lots and not involving the lending of money on citrus groves, except occasionally when there might be a home thereon, who had formerly acted as State Inheritance Tax Appraiser, and who determined the value to be $11,912.50. (T-14).

Fred Brock, a witness on behalf of the Creditor, testified that his business or occupation was orange growing and real estate and dry farming. That he had been engaged in real estate business since 1927, off and on during that time, and that he owned some property, that he fixed the value of $12,000.00, with heating equipment, and $11,000.00 without heating equipment. That in no place in his testimony does he show that he ever acted as an appraiser for any one and he testified that bidders in most cases today never question what the best production is but only, "Can I have the property." (T-14).

J. H. Nicholson, a witness on behalf of the debtors, testified that he was the assistant secretary of the Redlands Heights Groves, and has been since 1927; that he is familiar with the property and that the value of the property, in his opinion, was $6,000.00. (T-14).

Ted Pratt, called on behalf of the Creditor, testified that

he worked in the field for the Orange Belt Fruit Distributors of Pomona, who are packers, shippers and growers and has worked for them for three years,, and before that was an automobile salesman; that he did not appraise property for the purpose of sale or buying, but to give his company protection in advance on various crops. That the reasonable market value, in his opinion, is $12,000.00. (T-15-114). When asked to explain what he meant by reasonable market value, "Well, the use of the land for its most practical purpose and the value of the trees and water stock. It is not its potency, particularly, but its production. I investigated the crop record."

Peter J. Wumkes, the Creditor, testified that the property, in his opinion, was worth between $13,000.00 and $15,000.00. Dr. Wumkes is a retired dentist spending most of his time in Los Angeles and Pomona and had been in Redlands on only two occasions within the last six months. (T-138). When asked the question, "What in your opinion is the market value of this property?" he answered, "Well, I offered to take the property back." (T-15-136). Dr. Wumkes was further asked, "Would you be willing to take this property and cancel the indebtedness that you hold against it?" To which an objection was made and sustained. However, from his former answer, it is not difficult to conclude what his answer would have been had he been allowed to answer.

K. C. O'Bryan, called on behalf of the Creditor, testified that he was with the Southern Citrus Association, a packing house located in Redlands, and had been connected with said packing house for seven years.. That he individually and as a partner is owner of seven parcels of citrus property, has known the property here in question

since 1936, at which time he was handling the fruit on this property. He defined market value as, "I think it might be a price that the grove could be sold for and a bidder could be found within a reasonable time." (T-16). He does not testify that he ever acted as appraiser or had any experience in appraisal work and he gives as his opinion the value of the property to be $12,500.00.

During the testimony of K. C. O'Bryan (T-120) he was asked if he was prepared to make a cash offer for the purchase of the property, which was objected to, and Wumkes' counsel thereupon stated that he wished to offer proof of a cash offer in the amount of $10,000.00 for this property and to tender therewith cash in the amount of $50.00 and a certified check in the amount of $950.00, being 10% of the amont of the offer, to which an objection was made, and the Commissioner sustained the objection. (T-120).

The Commissioner referred to this matter in the proceeding (T-17) and set forth the law as he understood it in his decision stating Paragraph 3 of Subsection (s) of Section 75 of the Bankruptcy Act, containing the proviso as follows:

"That upon request of any secured or unsecured creditor, or upon request of the debtor, the Court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the Court shall, by an

order, turn over full possession and title of said property, free and clear of encumbrances to the debtor."

The second proviso provides:

"That upon the request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction.

The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with five per centum per annum interest, into court, and he may apply for his discharge, as provided for by this Act." (T-18).

The Commissioner further went on to say:

"In view of the foregoing, this commissioner is constrained to the opinion, that the offer of purchase made by witness K. C. O'Bryan, was inadmissible.

No authority in the Act is given the court to sell the property of debtor except at public auction and that, only after debtor has been given the opportunity to comply with the first proviso of paragraph 3, supra.

Wright vs. Central Life Insurance Co., C. C. H. 52, 826, decided by the Supreme Court of the United States on December 9th, 1940.

The court has also given its views on introduction of evidence on offer to purchase, in Sharp vs. United States, 191 U. S. 341, 48 Law Ed. 211.

The testimony in the case at bar discloses a very wide difference of opinion as to the value of the property in question.

On the one hand we have witnesses on behalf of debtors, who have had years of experience in appraising real property, the nature of property involved here, including State

Inheritance Tax Appraiser, of the county in which said property is situated, these witnesses arrive at their conclusions of value after viewing the property, testing the soil, preparing plat showing position of and condition of trees, taking photographs of trees and taking into consideration all the elements which enter into the determination of value.

On the other hand we have witnesses on behalf of creditor, which with one exception, have had no experience in appraisals, nor have they shown any knowledge of elements going to make up value, the exception is Mr. King, who states, that his appraising does not involve citrus groves unless there might be a home on a citrus grove on which his company lends moneys.

After duly considering all the evidence adduced at the hearing, the reading of the transcript, considering the qualifications of witnesses produced, and being fully advised in the premises, I have reached the conclusion that the value of debtors' property involved in this hearing, on which Peter J. Wumkes, creditor, has encumbrance, is of the value of $5,575.00.

When the matter was presented to the District Court there were two affidavits offered by Wumkes (T-36; T-38). The affidavit of L. A. Turner stated that the reasonable market value of the property was $12,500.00 and that said affiant would be willing, upon the expectation of reselling said property immediately at a considerable profit, to offer at this time the sum of $9,000.00 cash for the immediate purchase of said property and that he, therefore, made such an offer. To both of these affidavits objection was made and the District Court in its decision overruled the objection and ordered the affidavits filed and

considered and thereafter vacated the order made by the Commissioner-Referee determining value, stating that the evidence of the cash offer of $10,000.00 should have been considered and that the ruling of the Commissioner-Referee rejecting such an offer, was erroneous.

Thus we have presented to your Honor the question of the admissibility of offers to purchase in a hearing of this particular nature.

It is our thought that the remarks of the Commissioner, as set forth in his decision, were very pertinent on the subject and particularly that of the case of Sharp v. United States, 191 U. S. 341. The court there said:

> "Upon principle, we think the trial court was right in rejecting the evidence. It is, at most, a species of indirect evidence of the opinion of the person making such offer as to the value of the land. He may have so slight a knowledge on the subject as to render his opinion of no value, and inadmissible for that reason. He may have wanted the land for some particular purpose disconnected from its value. Pure speculation may have induced it, a willingness to take chances that some new use of the land might, in the end prove profitable. There is no opportunity to cross-examine the person making the offer, to show these various facts. Again, it is of a nature entirely too uncertain, shadowy, and speculative to form any solid foundation for determining the value of the land which is sought to be taken in condemnation proceedings. If the offer were admissible, not only is it almost impossible to prove (if it exists) the lack of good faith in the person making the offer, but the circumstances of the parties at the time the offer was made as bearing upon the value of such offer may be very difficult, if not almost impossible to show. To be of

> the slightest value as evidence in any court, an offer must, of course, be an honest offer, made by an individual capable of forming a fair and intelligent judgment, really desirous of purchasing, entirely able to do so, and to give the amount of money mentioned in the offer, for otherwise the offer would be but a vain thing. Whether the owner himself, while declining the offer, really believed in the good faith of the party making it, and in his ability and desire to pay the amount offered, if such offer should be accepted, or whether the offer was regarded as a mere idle remark, not intended for acceptance, would also be material upon the question of the bona fides of the refusal. . . . In our judgment they do not tend to show value, and they are unsatisfactory, easy of fabrication, and even dangerous in their character as evidence upon this subject. . . . There is no chance to cross-examine as to the circumstances of the party making the offer in regard to good faith, etc."

If this type of evidence is to be admitted, it would appear that a hearing to determine value would disintegrate into merely an auction sale and clearly the law did not anticipate such a procedure, for it gave to the debtor the sole right to buy the property. If such evidence were admitted any one could come in and make any kind of an offer that they desired without any fear that the offer would be accepted by the court and that they would suffer financial loss by reason of the making of said offer.

In the affidavit admitted by the District Court over objection, Mr. Turner clearly states that he is willing, because he expects to resell the property immediately at a considerable profit, to offer $9,000.00 cash for the immediate purchase of the property. Mr. Turner could not buy the property expecting immediate delivery, nor could the

Commissioner guarantee or assure him that he could immediately sell the property at a profit, without any responsibility being placed upon the bidder and no possibility of him being able to buy the property. The District Court asserts that such an offer should be admitted and considered by the court, and even though the Commissioner had heard the testimony and determined in his mind that the offer made by K. C. O'Bryan was inadmissible and that the element of good faith in said offer was very questionable, yet the District Court stamps this offer as a substantial and firm good faith commitment. Counsel, therefore, respectfully contends, first, that the Honorable District Court erred in vacating, setting aside and annulling the Order of the Conciliation Commissioner determining value of debtors' real property, dated June 21, 1944, and Secondly, that the District Court admitted and considered improper and illegal evidence in the making of that decision, to-wit, the affidavits and offers to purchase of Donald D. Wyllie and L. A. Turner, and others.

Respectfully submitted,

H. R. GRIFFIN,
Attorney for Appellants.

No. 10945

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES GOODWIN POWELL and ANNA STRACHAN POWELL, Husband and Wife,

Appellants,

vs.

PETER J. WUMKES,

Appellee.

APPELLEE'S BRIEF.

NICHOLS, COOPER & HICKSON
413 First National Building, Pomona, Calif.,

C. P. VON HERZEN,
725 Citizens National Bank Building, Los Angeles 13,

Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone TU. 5206.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES.

STATUTES.

No. 10945

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES GOODWIN POWELL and ANNA STRACHAN POWELL, Husband and Wife,

Appellants,

vs.

PETER J. WUMKES,

Appellee.

APPELLEE'S BRIEF.

Preliminary Statement.

This is the second appeal by the bankrupts from an order of the District Court reversing two separate decisions by a Conciliation-Commissioner-Referee, giving the bankrupts the right to obtain the subject property at a price grossly disproportionate to its actual value. (*Powell v. Wumkes*, 142 Fed. (2d) 4.)

Although the schedules have not been included in the transcript of the present appeal, they constitute a portion of the record of the Bankruptcy Court, were considered by the court below, and are in the records of this court in the matter of the previous appeal. (Ninth Circuit No. 10610.) These schedules show that the bankrupts purchased the property which the Commissioner-Referee attempted to transfer to the bankrupts by payment of $5,575.00 [Tr. p. 29] in 1938, for the sum of $13,500.00;

$2500.00 being paid in cash, and the balance of $11,000.00 being secured by a purchase money note and deed of trust on said property. Within two years, in July, 1940, the bankrupts filed a debtors' petition under Section 75 of the Bankruptcy Act, stating under oath that the real property had a value of $8,000.00. In December, 1942, the debtors petitioned for a re-appraisal under the provisions of Section 75, Subdivision S(3), and at that time the Commissioner-Referee fixed the value of the property at $3,900.00, which determination was promptly set aside by the District Court on review, Honorable Leon Yankwich, Judge Presiding, such action being affirmed on appeal by this court. (*Powell v. Wumkes, supra.*)

Upon a re-trial of the issues, without any testimony from the bankrupts (Appellants herein), and largely upon the investigation made by certain individuals prior to March of 1943, the Commissioner-Referee fixed the value at $5,575.00, which was again promptly set aside by the District Court, Honorable Paul McCormick, Judge Presiding, and which action of the District Court is the subject matter of this appeal. The review, which resulted in the determination appealed from herein, was made upon a transcript of the testimony taken before the Commissioner-Referee, his findings and order [Tr. p. 21], the schedules of the debtors (now bankrupts), the claim of Peter J. Wumkes (Appellee herein)* and additional af-

---

*The schedules of the bankrupts and the approved claim of the secured creditor are a part of the bankruptcy court's file, and were before the lower court; the arguments below referred to the facts herein recited. Such documents are not included in this transcript, but the schedules and the amount of the approved claim are included in the transcript of appeal No. 10610, a portion of this Court's records. We request Appellants to concede the correctness of the facts, and in the absence of such concession will move to augment the record by these documents.

fidavits by two persons engaged in the orange packing business, Donald D. Wyllie, a resident of Redlands Citrus District for the past twenty years, and L. A. Turner, engaged in the business of growing, packing and shipping citrus fruits, and a co-owner of approximately 500 acres of citrus properties in the district, who declared the property to have a value of $13,000.00 and $12,500.00, respectively.

During the course of the presentation of the review before the District Court, a question arose as to whether rentals fixed by the Commissioner had been paid, and it was then stipulated that no monies, pursuant to such rental order made by the Commissioner-Referee, had been paid to or received by the secured creditor from the inception of the proceedings. [Tr. p. 47.]

Although the bankrupts objected to the introduction of the affidavits of Messrs. Wyllie and Turner [Tr. p. 41], the nature or grounds of the objections were not stated in the District Court, and are not stated in Appellants' Brief, except, apparently, as the affidavit of Mr. Turner included an offer to purchase for $9,000.00 cash, with a view of making a quick profit. [Tr. p. 38.]

Both the Commissioner-Referee and the bankrupts appear to ignore the crop on the trees which was estimated to be worth between $5,000.00 and $5,500.00, by the witnesses appearing for the creditor [Tr. p. 37], and admitted by the debtors' chief witness, to have a value of at least $3,000.00. [Tr. p. 73.]

Appellee's Points and Arguments in Support of District Court's Determination.

(A) The District Court, on Review of the Commissioner-Referee's Order of June 21, 1944, Correctly Permitted the Introduction of Additional Testimony, and Based Upon Such Enlarged Record, Correctly Exercised Its Discretion in Reversing the Commissioner-Referee's Decision.

It is, of course, elementary that the fundamental and primary responsibility for a decision made in any proceeding in the Federal Court is that of the District Court.

The Bankruptcy Act places the responsibility for the accurate, fair and impartial administration of the Bankruptcy Act upon the District Courts sitting in bankruptcy.

> "(a) The Courts of the United States hereinbefore defined as Courts of Bankruptcy * * * are hereby invested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Title * * * to * * * (10) consider records, findings, and orders certified to the judges by referees and confirm, modify or reverse such findings and orders or return such records with instructions for further proceedings; (15) make such orders, issue such process and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Title * * *.
>
> "(b) Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated." (11 U. S. C. A., Sec. 11, Chapter 2, Courts of Bankruptcy.)

In re Albert, 122 Fed. (2d) 393.

A Bankruptcy Court is a court of equity and is guided by equitable doctrines and principles.

Pfister v. Northern Illinois Finance Corp., 63 Sup. Ct. 133; 317 U. S. 144; 87 L. Ed. 146;

American United Mutual Life Insurance Co. v. City of Avon Park, 61 Sup. Ct. 157; 311 U. S. 138; 85 L. Ed. 91.

The District Court, in the exercise of a sound discretion, can, in a proper case, take additional evidence if it deems such evidence necessary to prevent a miscarriage of justice, and based on such evidence, and also the evidence contained in the certificate on review, may correct, modify or reverse the order of the Commissioner or Referee.

Equity Life Assurance Society of U. S. v. Carmody, 131 Fed. (2d) 318;

Rait v. Federal Land Bank, 135 Fed. (2d) 447;

Dunsdon v. Federal Land Bank, 137 Fed. (2d) 84;

Kauk v. Anderson, 137 Fed. (2d) 331;

Rhodes v. Federal Land Bank, 140 Fed. (2d) 612.

In *Kauk v. Anderson, supra*, the Circuit Court of the Eighth Circuit, states the functions of the District Judge on Review of a determination by the Referee as follows:

> "* * * The function of the district judge, in reviewing the determination of the conciliation commissioner, is to ascertain (1) whether a fair hearing was accorded, (2) whether all competent evidence

offered was received and considered, (3) whether any incompetent evidence was received and relied upon, (4) whether there was substantial competent evidence to support the determination, and (5) whether it is contrary to the clear weight of all of the competent evidence adduced. * * *"

"* * * The record on review may afford a sound and sufficient basis for a determination of value by the district judge and therefore justify a modification of the commissioner's valuation. Unless the record does furnish such a basis, we think that the proper course for the district judge to pursue is either to take additional evidence and then determine the issue from the evidence as supplemented or to remand the case to the commissioner with directions to retry the issue of value, pointing out to him the errors which invalidated his previous determination. * * *"

With respect to the duties of the District Judge in determining a petition for review from an order made by a referee, it has been repeatedly and consistently held that such duties of the District Court embrace large supervisory powers and are greater than the duties of an Appellate Court: the District Court must assume the responsibility for the litigants having had a fair and impartial determination of their controversy, based upon the entire record and such other evidence as the District Court may have permitted, the Appellate Court is only charged with the duty of ascertaining whether reversible error has been committed. (Rule No. 52 (a) of the Rules of Civil Procedure, 28 U. S. C. A., following Section 723 (c).)

In a footnote in the case of *Rhodes v. Federal Land Bank of St. Paul, supra*, the Eighth Circuit Court of Appeals has correctly set out the function of the District Court at page 613:

> "Our previous decisions point out that, unless there has been some error in the conciliation commissioner's processes, the district judge may not simply try the question of value de novo on the record, but that he does have the right, if the record suggests that a gross miscarriage of justice probably has occurred, to test the situation by receiving additional evidence, and, in the new legal situation thus created, to make such disposition of the matter as the entire evidence before him appears soundly to demand. Dunsdon v. Federal Land Bank of St. Paul, 8 Cir., 137 F. 2d 84, 86, 87; Kauk v. Anderson, 8 Cir., 137 F. 2d 331, 334."

Likewise, the Ninth Circuit Court has cited with approval the Eighth Circuit's decision on this rule and has expressed itself, as follows:

> "But unlike the Appellate Court, the judge is empowered in appropriate circumstances, to receive further evidence; and on the basis of the enlarged record he may modify or make findings, or may re-commit the matter for further hearing by the Referee * * * the judge must be conceded a reasonable measure of discretion, and we think it enough to say that his discretion was not abused in this instance. Powell v. Wumkes, 142 F. 2d 4-6."

(B) The Record Is Replete With Errors Committed by Commissioner-Referee Which Indicated That a Miscarriage of Justice Had Occurred.

The following excerpts from the testimony show the errors committed by the Commissioner-Referee, and also the fact that certain of the witnesses were not entitled to have their testimony considered of any value, and also that as to certain of said witnesses, the necessary factors to determine present market value were omitted.

The witness, Charles Aubrey, was apparently testifying from an examination of the property in 1943:

> "Q. Did you examine the soil on that particular grove? A. I examined the soil back in January, 1943. I dug some holes in the soil.
>
> Q. That was prior to your former testimony in this Court? A. Yes." [Tr. p. 53.]

> "Q. What is your conclusion? A. Well, I think it is worth $5200 with the crop. As of January 28th, 1943, I estimated it at $3900 and I think the actual increase in value will amount to a third higher than it was at that time. * * *" [Tr. p. 56.]

Likewise, this witness' appraisal ignored the crop on the trees:

> "Q. Would that appraisal be affected in any way by the crop that was on the trees? A. I don't think it would. * * *" [Tr. p. 58.]

The present crop and its present value were immaterial to this witness:

> "Q. The price of $5200, or the valuation of $5200 that you place on this property did not in any way

consider the crop that was on the trees? A. Only an average crop is the only way I would consider it over a period of at least 10 years." [Tr. p. 59.]

The witness was unwilling to consider the proper factors in determining market value and his opinion would not be changed by any known offers to purchase the property:

"Q. Would it affect your appraisal and your fixing a reasonable value if you knew an offer of $10,000 was made for the property? A. Not a bit in the world, on this market. I would not be at all surprised to hear of that being offered, but that is no sign I think it is worth it." [Tr. p. 62.]

"Q. So, to sum up your testimony, if I understand it correctly, the fact that there may have been cash offers for the property considerably in excess of the amount that you have fixed as a reasonable value of this property, that still would not change your estimate of the reasonable or market value of the property?

(Objection and ruling.)

A. I think I know exactly what I said. It would have no bearing upon my judgment." [Tr. p. 63.]

The witness, J. W. Mehl, was likewise unwilling to take into consideration those factors which normally comprise the basis of market value:

"Q. If there was a ready buyer for this property for $10,000 cash would that affect your appraisal, if you knew that that offer was being made? A. * * * No." [Tr. p. 69.]

"Q. In appraising this property did you inquire as to whether there had been any sales in that locality? A. I did not." [Tr. p. 70.]

The Commissioner-Referee improperly sustained objections to questions put to this witness on cross-examination.

> "Q. Assuming that the fruit on this—the packing house net returns on this property brought in the neighborhood of $5,000 this year, that is, the 1943-1944 season, would that affect your appraisal?
>
> * * * * * * * * *
>
> (Objection.)
>
> Mr. Duffy: I think that will have to be sustained." [Tr. pp. 71-72.]

Although the production costs for growing, spraying, etc., taxes and even the bankrupts' attorneys' fees, had already been paid (Appellee claims illegally and erroneously from the share of the crop set aside as rental), the Commissioner-Referee accepted the testimony of J. W. Mehl as controlling, when such testimony *conclusively* shows that his estimate was reduced in order to provide for the cultural costs:

> "By Mr. Duffy: Q. What is the figure now that this court has got to deal with? A. I have given $4450 without the crop; an estimated crop of $3,000, but a net to the grower of $1125.
>
> Mr. Duffy: Then your value of the property—A. Without the crop would be $4450.
>
> Mr. Duffy: And $1125 for the crop? A. Yes, net to the grower, that is $5575.
>
> By Mr. Nichols: Q. How did you arrive at that net figure that you give? A. I get that from packing house men, that it should bring net to the grower 75 cents a field box.
>
> Q. I assume you have based that figure on a ceiling price on Valencias? A. That is right.

Q. And that is $2.00, is it? A. Yes, 4 cents a pound, I think it is.

Q. Do you know what size box the packing house has? A. 50 pounds a box.

Q. What would that ceiling be? A. $2.00 for a field box, so I understand.

Q. Then you figure it costs the grower $1.25 per box to raise that fruit? A. That is right.

Q. On a basis of obtaining a ceiling then, a deduction of $1.25 per field box for growing that would leave 75 cents net to the grower? A. Right.

Mr. Nichols. That is all.

Mr. Griffin: That is all* [Tr. p. 73.]

The witness, W. H. Johnson, based most of his testimony on investigation made by him previous to March of 1943:

"Mr. Duffy: Debtor's Exhibit 4 admitted in evidence at the last hearing on this proceeding, to wit, on the 3rd day of March, 1943, and now being filed in the office of the Clerk of the United States District Court, Southern District of California, Central Division, is now admitted as an exhibit in this hearing as 'Debtor's Exhibit 4.'

Mr. Nichols: I have no objection to its being admitted in this hearing with the understanding that it is admitted as a chart which was made on the day that Mr. Johnson will testify that it was made.

Mr. Griffin: No objection to that.

---

*The certificate on review of the Commissioner-referee states that he is submitting a "copy of report furnished petitioning creditor and attorney for petitioner creditor dated November 3, 1943." This report has been omitted from the transcript.

By Mr. Griffiin: Q. Since the time that you made this plat, have you been upon the property? A. Yes, sir.

Q. Do you know whether there have been any changes made on the property that you have not indicated on the plat? A. Not that I know of. Possibly a few new trees may have been put it. I did not check that definitely. * * *." [Tr. pp. 75 to 77.]

"Q. Now, did you take some pictures out there of the grove? A. Yes, sir.

Q. These pictures that you took are the ones that were taken for the former hearing? A. Yes, just a few days before the former hearing.

Q. And that was approximately a year ago? A. Yes, a little over a year ago." [Tr. p. 79.]

The Commissioner-Referee erroneously overruled the creditor's objections to the photographs:

"By Mr. Griffin: Q. I show you another picture and ask you what that purports to be? A. That is another picture in the rear of this same orchard.

Q. And when was that taken? A. I think it was taken in February, 1943.

Q. And it was taken for the purpose of showing the size of the fruit? A. The size of the fruit and it was a 14 foot pole there. * * *

Mr. Griffiin: I offer that in evidence.

Mr. Nichols: Object to it.

Mr. Duffy: Overruled. Admitted as Debtor's Exhibit 8." [Tr. p. 82.]

"Mr. Nichols: I want my objection to show the grounds that no foundation has been laid, and that

the pictures were taken too long ago to correctly represent what the present condition of the property is.

Mr. Duffy: The same ruling. * * *" [Tr. p. 84.]

Likewise, his opinion was based on sales made a year previously:

"Q. And that was sold more than a year ago? A. Just about a year ago, I think. Well, it was not sold at the time we had this hearing here. * * *" [Tr. p. 89.]

"Q. How long ago was that sale made to your knowledge? A. Oh, I should judge something like a year ago; I don't remember exactly." [Tr. p. 90.]

At the time of his testimony he did not know of any citrus property in the general locality available for purchase at $1,000.00 per acre:

"Q. Do you know of any citrus property in this general locality available for the purchase for a thousand dollars an acre? A. No, I don't." [Tr. p. 89.]

In that respect, it may not be amiss to call the court's attention to the fact that all of the reported cases consider the value that is the subject matter of inquiry under Section 75, Subdivision S(3), to be the *present* value, one that exists at the time of the hearing.

The *Rhodes v. Federal Land Bank* case, *supra*, referring to this subsection, refers to "the *present* fair and reasonable market value." (Emphasis added.)

The case of *Carter v. Kubler*, 320 U. S. 243, 88 L. Ed. 27, in a decision based upon the same subsection, refers

to "the *present* fair value of such farm." (Emphasis added.)

The witness, J. H. Nicholson, placed his estimate of $6,000.00 on his personal willingness to purchase it at that price.

> "Q. So the value you place on it would be the price on which you would be willing to purchase it? A. Yes, sir.
>
> Q. And that is the sole basis for your fixing the market value at that figure of $6,000? A. Yes, sir." [Tr. p. 99.]

The Commissioner-Referee erroneously sustained an objection to a question bearing on the qualifications of the witness, Fred Brock, and the basis upon which he formed his opinion:

> "By Mr. Nichols: Q. What, if any, sales are you familiar with?
>
> Mr. Griffin: Objected to as incompetent, irrelevant and immaterial.
>
> The Court: Sustained." [Tr. p. 109.]

The Commissioner-Referee erroneously refused to consider a *bona fide* offer to purchase by the witness, K. C. O'Bryan:

> "Q. What, in your opinion, is the reasonable market value of that property? A. I think it is worth $12,500. However, I come over here prepared to make an offer of $10.000 for it, all cash.
>
> Mr. Griffin: I move to strike the last part of the statement out as incompetent, irrelevant and immaterial.
>
> Mr. Duffy: The last part may be stricken out." [Tr. p. 119.]

* * * * * * * *

"Q. So that your valuation without the crop at this time is $9,000? A. Yes, but I am willing to pay $10,000 with the crop.

Mr. Duffy: Mr. Witness, you will not volunteer any more information. Let the last part of the answer be stricken out.

* * * * * * * *

Q. By Mr. Nichols: At this time I would like to offer proof by a cash offer and I will tender proof of a cash offer in the amount of $10,000 for this property and tender herewith cash in the amount of $50. and a certified check in the amount of $950, being ten percent of the amount of the offer. I am handing that over to you at this time, Mr. Duffy.

Mr. Duffy: I cannot accept anything of that kind.

Mr. Griffin: Objected to as incompetent, irrelevant and immaterial.

Mr. Duffy: The objection is sustained. Now, this money is not under my jurisdiction so you better get it away from here as I am not responsible.

Mr. Nichols: If you are refusing to entertain the offer in any way—

Mr. Duffy: I have sustained the objection to the offer." [Tr. p. 120.]

While it may be argued that testimony by an owner of offers made to him is subject to the objections stated in *Sharp v. United States,* 191 U. S. 341, 48 L. Ed. 211, that case does not hold that the offeror himself cannot testify, as the honesty of his offer, his ability to purchase, his capability of forming a fair and intelligent judgment, and his desire, are all available subjects of cross-examina-

tion. The testimony is at wide variance with the facts in the foregoing case, and the Supreme Court recognizes this distinction by stating, following a recital of the difficulties that beset testimony by an owner concerning offers made to him:

> "* * * Especially is this the case when the offers are proved only by the party to whom they are alleged to have been made, and not by the party making them. * * *"

(C) The Record Indicated That the Commissioner-Referee May Have Departed From His Duty to Conduct the Hearing With Fairness and Impartiality, and by Reason of Such Departure, a Miscarriage of Justice Had Occurred.

(1) The excerpts from the testimony presented herein, while in some instances not conclusive as to error committed by the Commissioner-Referee, nevertheless exemplify a bias and lack of impartiality to well move the District Court to refuse confirmation of the Commissioner-Referee's decision, and to return the record with instructions for further proceedings.

(2) In the decision made by the Commissioner-Referee dated May 26, 1944, the Commissioner indulges in the following speculative conclusion:

> "Another question.
>
> Q. Would you be willing to take this property and cancel the indebtedness that you hold against it? (Objected to and sustained.)
>
> It is not difficult to conclude what the answer of witness would have been had he been allowed to answer. It is obvious from the testimony quoted, that this witness, Peter J. Wumkes, creditor and holder

of encumbrance on the property in question, is desirous of regaining possession of said property." [Tr. pp. 15-16.]

(3) Without any evidence whatever, and without even the suggestion of an inference therefor, the Commissioner-Referee finds that the offer to purchase made by one of the witnesses for the creditor, K. C. O'Bryan, was based upon pure speculation and lacked the element of good faith. [Tr. p. 26.]

We do not know what prompted the Commissioner-Referee in reciting the qualifications of the two Inheritance Tax Appraisers appearing as witnesses in the case to say that the one appearing for the debtors had "considerable" appraising experience, and the one appearing for the creditor having only "some" appraising experience. [Tr. p. 13.] Neither can we state with definiteness what motivated the Commissioner-Referee in first sustaining an objection to a question and then concluding what the answer was going to be, as shown above. But the District Court, in the exercise of a sound discretion, found "that the Commissioner-Referee prejudicially erred in failing to consider evidence of other sales of comparable property" [Tr. p. 40], and branded the value fixed by the Commissioner-Referee as "unfair." [Tr. p. 41.]

It seems obvious from a reading of the Commissioner-Referee's decision, his findings of fact, and the transcript that the charge made by the District Court was justified, and its discretion was properly and correctly exercised on the showing that a "fair" hearing was not accorded to the Appellee.

Conclusion.

In conclusion we direct the court's attention to the fact that the Appellants' Brief presents no justifiable reason to reverse the judgment of the District Court. The Appellants confine their attack to one portion of the record alone. They do not dispute the fundamental principles which we have shown herein, nor the correctness of their application to the record made in the court below.

The discretion exercised by the District Court in rejecting the decision of the Commissioner-Referee was used in the interests of justice, and it appears that no charge of abuse of such discretion can properly be urged. The determination of the former Commissioner-Referee, the method used in arriving at his conclusion, and the obvious lack of judicial impartiality in conducting the hearing and making his decision, lead to the inevitable conclusion that the District Court acted to prevent a miscarriage of justice.

We respectfully submit that the determination of the District Court is correct when the principles of either law or equity are applied to test the soundness of its judgment and that therefore the order appealed from should be affirmed.

Respectfully submitted,

NICHOLS, COOPER & HICKSON and
C. P. VON HERZEN,

Attorneys for Appellee.

No. 10945

In the United States
Circuit Court of Appeals
For the Ninth Circuit

JAMES GOODWIN POWELL and ANNA STRACHAN POWELL, husband and wife,
Appellants,

vs.

PETER J. WUMKES,
Appellee.

APPELLANTS' CLOSING BRIEF

H. R. GRIFFIN,
Katz Building,
San Bernardino, California
Attorney for Appellants.

Barnum & Flagg Company, San Bernardino, California

TOPICAL INDEX

TABLE OF CASES CITED

No. 10945

In the United States
Circuit Court of Appeals
For the Ninth Circuit

JAMES GOODWIN POWELL and ANNA STRACHAN POWELL, husband and wife,
Appellants,

vs.

PETER J. WUMKES,
Appellee.

Appellants' Closing Brief

ARGUMENT

From an examination of Appellee's brief, it is clear that they have not desired to meet the issues presented in this case for, rather than to discuss the point of law raised by the District Court, they have chosen to inject into the case new issues and points not considered or pointed out by the District Judge in his decision. The Judge overruled the objections of debtor which were argued before him as to the admissibility of certain affidavits and ordered them filed and considered. Then the District Judge found that the action of the Commissioner rejecting any consideration of a cash offer of the Petitioner of $10,000.00 for the

property was erroneous and showed that the issue of value had not been competently tried and determined.

Thus, we have the question presented in simple form SHOULD AN OFFER OF PURCHASE BE ADMITTED AND CONSIDERED BY THE COURT?

We do not intend to take up the time of the court by arguing the right of the District Court to receive additional evidence for that is now elemental, but it is our contention that such evidence should be admissible and proper evidence. Let us here consider the Affidavit of L. A. Turner which was admitted by the District Judge over the objection of counsel, remembering that this was an affidavit which counsel had no right or opportunity to cross-examine the maker as to the alleged facts therein set forth. At the close of the affidavit the affiant said:

"That your affiant would be willing, upon the expectation of reselling said property immediately at a considerable profit, to offer at this time the sum of $9,000.00 cash for the immediate purchase of said property, and herewith make such an offer." Tr. 38.

This is the type of evidence that Appellee is insisting on injecting into this case and at its best can only be considered to be an offer to purchase, yet it is not phrased in such language that it is a definite or unconditional offer.

Under the provisions of Par. 3 of subsec. (s) of Section 75 of the Bankruptcy Act the debtor is the sole person who can buy the property and, therefore, any one bidding can do so without fear of having his offer or bid accepted. Certainly such a condition would not encourage legitimate offers and we are constrained to feel that the court will agree with the law so ably set out in Sharp vs. U. S. 191, U. S. 341, in which the court declined to permit the

consideration of offers of purchase, stating that they did not tend to show value, they were unsatisfactory, easy of fabrication and even dangerous in their character as evidence. This case was mentioned heretofore and cited in our Opening Brief.

Again, may we repeat that if such evidence is admitted, then a hearing to determine value, might well disintegrate into an auction sale with all kinds of offers being made and yet no one bidding, having any fear that his offer can be accepted, for the debtor under the law has the sole right to buy the property at the value so fixed.

The case of Kauk vs. Anderson, 137 F(2d) 233 does not deal with any offer of purchase but merely authorizes and approves the receiving of evidence of recent sales of farms similar to the farm in suit. And nowhere in that case do we find any facts or law dealing with the question of the admissibility of a cash offer for the farm under consideration. The case of Kauk vs. Anderson is one that departs somewhat from the established law in the State of California, for, in that State, evidence of other sales is only admissible when asked upon cross-examination for the purpose of testing the witness' knowledge and impeaching his opinion and not for the purpose of fixing the value of the land in dispute. Reclamation District vs. Inglin, 31 Cal. App. 495 at 500, Spring Valley W.W. vs. Drinkhouse 92 Cal. 528, at 532, 10 Cal. Jur. p. 364.

It is to be noted throughout the transcript that the Commissioner time and time again permitted evidence of other sales to be admitted, for we find in examining the Witness, Charles Aubrey, these questions:

Q. Now, are you familiar with any sales in the general locality within the past six months?

A. There was one place sold directly on the East side of this property, before I appraised in 1943, for $2,100.00, a five (5) acre piece sold to Mr. Hinkle. Tr. 60.

Q. Do you know what you sold it for?

A. Somewhere around $4,500.00. Tr. 61.

Q. Within the last six months have you made any inquiry in the general locality of the Wumkes Grove as to any sales?

A. Yes, I have made some inquiry.

Q. Did you learn of any sales in the locality within a radius of two miles of the Wumkes Grove?

A. No. Tr. 60.

Again, a similar question was asked of the Witness, J. W. Mehl:

Q. In appraising this property, did you inquire as to whether there had been any sales in that locality?

A. I did not. Tr. 70.

The Witness, Johnson, was asked on cross-examination:

Q. Have you sold any citrus property in this general locality within the last six months?

A. No.

Q. Have you had any listed for sale?

A. No.

Q. How near would you say the nearest grove that you had listed for sale was with respect to this property?

A. Oh, probably a mile and one-half or two miles.

Q. How many acres are there in that piece?

A. Five acres.

Q. What was it listed with you at?

A. I sold it for $5,500.00. Tr. 86.

And then Appellee's counsel went into all of the details of that sale, and again Appellee's counsel asked the

same witness, W. H. Johnson:

Q. Were there any sales that you know of?

A. Yes, the adjoining property to Wumkes, to the East, was sold.

Q. How many acres was that? A. 5 acres.

Q. What did that sell for? A. $4,500.00.

Q. Did you know of any other property?

A. Fifteen acres sold across the street from this grove.

Q. What did that sell for? A. $9,000.00.

Q. Did you know of any other property that was sold? Tr. 89.

And again, Appellee's counsel asked many questions covering the value and the sales of this nearby property?

Thus, clearly we note that evidence of other sales was admitted and considered by the Commissioner in his decision.

DISCUSSION OF APPELLEE'S POINTS

Appellee's counsel has first argued the right of the District Court to permit the introduction of new evidence and, as we have heretofore said, we have no quarrel with that right providing the new evidence is admissible and proper.

Secondly, Appellee has attempted to inject new points of error not raised in or decided by the District Court, which he contends indicate a miscarriage of justice had occurred. Most of these deal with the admissibility of offers of purchase and, without the citation of any legal authority, he brands each ruling as error. When the Witness, Aubrey, testified that an offer of $10,000.00 would not affect his appraisal, counsel immediately cites that as error and yet was not the witness right, for his appraisal is fixed by what he thinks, after considering all

of the facts, the property to be reasonably worth. And this the witness indicates when he testified "I would not be at all surprised to hear of that being offered, but that is no sign I think it is worth it." Tr. 62. Certainly the witness has the right to weigh in his mind the various factors and from them to determine what in his opinion was a reasonable fair market value. It is quite possible that he felt the same way as Mr. Mehl did when he was asked,

Q. If there was a ready buyer for this property for $10,000.00 cash, would that affect your appraisal, if you knew that that offer was being made?

A. I think the man would be crazy. Tr. 69.

But Mr. Mehl went on further to testify:

Q. In the event you knew there were three offers to purchase with various purchasers on a cash basis between $9,000.00 and $10,000.00 for this property, would that affect your appraisal?

A. Naturally, it would.

Again counsel criticizes the referee for ruling out a hypothetical question which clearly did not state all of the material facts to be embraced in the question, and again no authority is given for his conclusion that it is error, and we submit that certainly such an objection was proper. Appellee's Brief, Page 10:

Q. Assuming that the fruit on this packing house net returns on this property brought the neighborhood of $5,000.00 this year; that is, the 1943-1944 season, would that affect your appraisal?

Mr. Griffin: Objected to as incompetent, irrelevant and immaterial and asking for a conclusion of this witness as to what were the net returns. Is there anything taken out for pruning, fertilizing or upkeep?

Mr. Nichols: I am not bringing that into the question. I say the net packing house returns.

Mr. Duffy: You are assuming that certain things are done?

Mr. Nichols: That is right.

Mr. Duffy: Then you are asking him to fix the value on an assumption as to what might be the returns.

Mr. Nichols: No, it is a hypothetical question if the net returns received from the packing house were $5,000.00 on this property, would that affect or have any effect upon Mr. Mehl's appraisal of this property?

Objections sustained. Tr. 71-72.

Appellee's counsel, in his brief, then goes out of the record to state that the production cost and even the bankrupts' fees have been paid, which is incorrect and certainly, even if it had been true, those elements should have been embraced in the propounding of such a hypothetical question.

Again, it was pointed out by Appellee as error, that the Commissioner admitted certain photographs which were used before at the prior valuation hearing and were included in the record on appeal at that time, and although the witness testified that he knew of no change. See Tr. 75-77. Counsel states that such was error but again cites no authority.

CONCLUSION

Counsel for Appellee apparently has fellen into that failing of so many advocates that when a ruling is made against him, although he admits that the error is not conclusive. See Page 16 of Appellee's Brief, and cites no authority, yet he immediately charges the referee with bias

and lack of impartiality. We submit that a reading of the transcript readily shows that the Commissioner conducted himself in a judicial manner and ruled upon the evidence justly and fairly. The District Judge did not find that a fair hearing had not been accorded but confined his decision to the discussion of the alleged error of law committed by the Commissioner in refusing to consider evidence of other sales of comparable property and particularly in failing to consider the cash offer of $10,000.00. Let us not be led far afield by these new issues injected by Appellee and forget the real issues as raised by the District Judge.

The question of the admissibility of offers to purchase is the question that the District Court determined and such a question will without a doubt arise again in this and other cases unless it is determined once and for all by this case.

It is our contention that such evidence is not admissible and that the District Court erred in admitting and considering such evidence and erred in vacating and setting aside the ruling of the Commissioner because the Commissioner refused to permit the introduction of an offer to purchase said property, which said offer could not by its very nature be accepted and which the Commissioner found that by reason of the law and the testimony of the witnesses that said offer was based upon pure speculation and was to purchase said property for a particular purpose; and further found that the element of good faith in said offer was very questionable. Tr. 26.

The function of the District Judge, in reviewing the determination of the Conciliation Commissioner, is to ascertain:

1. Whether a fair hearing was accorded;

2. Whether all competent evidence offered was received and considered;

3. Whether any incompetent evidence was received and relied upon;

4. Whether there was substantial competent evidence to support the determination;

5. Whether it is contrary to the clear weight of all of the competent evidence adduced. Dunsdon vs. Federal Land Bank, St. Paul, 137 Fed. (2d) 84.

The District Judge here merely decided that the Commissioner-Referee prejudicially erred in failing to consider other sales and particularly in failing to consider evidence of a cash offer, and upon that error of law reversed the case after considering the affidavits introduced.

If the District Judge erred in admitting these offers of purchase and the Commissioner properly excluded the offers of purchase, then it should follow that the decision of the District Court should be reversed and the decision of the Commissioner upheld, for that was the only criticism that the District Judge made of the Commissioner's decision.

Certainly from a factual viewpoint it is to be noted that the witnesses produced on behalf of the Debtor Powell were men of high standing and ability, that their appraisals are not out of line with even the reported sales, for Mr. Aubrey testified that one adjoining five acre piece sold for $4,500.00. Tr. 61, and Mr. Johnson testified to selling another five acre piece in close proximity for $5,500.00. Tr. 86. And again testified to selling fifteen acres across the street for $19,000.00. Tr. 89.

Thus clearly do we feel that the decision of the Com-

missioner is upheld by the evidence and that the District Judge may not try the issue de novo upon the records and substitute his judgment of value for that of the Conciliation Commissioner. Dunsdon vs. Federal Land Bank, St. Paul, Supra.

We, therefore, respectfully submit that the decision of the Commissioner should be upheld.

Respectfully submited,

H. R. GRIFFIN,

Attorney for Appellant.